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ABATEMENT; See Practice, civil—Actions, 1; Practice, civil—Pleading, 5.

ACKNOWLEDGMENT; See Conveyances, 6; Husband and Wife, 3.

ADJOINING PROPRIETORS; See Contracts, 1; Fences, 2; Land and Land Titles, 10, 11.

ADMINISTRATION.

1. *Administrator's sale—Land purchased by Judge—Report of sale, etc.*—An administrator's sale and deed of land are not rendered invalid by reason of the fact that another and distinct tract, sold at the same sale, was purchased by the probate Judge, contrary to law, and that the same report, reciting both sales, was approved by the Probate Court.—Bacon v. Morrison, 68.

2. *Sheriff's deed—Recitals as to judgment in favor of administrator.*—The record entry of a judgment recited its rendition in favor of A. and B. The execution recited judgment of same date for same sum and against same defendant, but in behalf of A. & B., as administrators, and alleged that their letters had been revoked, and that execution had been ordered in the name of the public administrator, and the substitution was shown by the court records *Held*, that the record taken together, sufficiently showed that the judgment was in favor of A. & B., in their administrative capacity, and that a sheriff's deed reciting such judgment, was not *quoad hoc* defective.—Acock v. Stuart, 150.

3. *Curator—Final settlement—Suit by sureties against public administrator.*—The final settlement of a curator with his ward is a lien on the real estate of the curator, to the extent of the indebtedness shown by the settlement; and the failure of a public administrator having the curator's estate in charge, to state the fact of such lien in his petition for the sale of the land, as required by statute, (Wagn. Stat., 95, § 11) would constitute a breach of his bond, but would not render him liable thereon to the sureties on the curator's bond for the sums they had been compelled to pay by reason of the default of the curator. The damages on such proceeding would be too remote and consequential.—State, to use, Lovell v. Todd, 217.

4. *Agent of deceased person may testify as to transactions subsequent to the death.*—A transaction had by the agent of a deceased person, since the death of his principal, may be shown in evidence, but in such case the agent himself must testify.—Leeper v. McGuire, et al., 360.

5. *Administrator—Admissions touching estate, when incompetent.*—An administrator may testify touching transactions regarding the estate of the deceased which occurred before the granting of his letters; but his admissions after he becomes administrator, affecting as they do the interests of the estate, cannot be proved.—Id.

6. *Administrator's estate—General and special statutes of limitation.*—In the absence of any notice of the grant of letters of administration, the general statute of limitation applies, and begins to run in favor of the estate from the date of the letters.

Where notice of the grant of letters has been given, the special statute of three years takes effect, and the failure of such notice does away with that special bar, but not with the general limitation law.—Ayers, admr. v. Donnell, exr., 396.

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AGENCY.

1. *Evidence—Corporations—Admissions by agent, bind when.*—Language used by the superintendent of a street railway company, admitting and justifying an assault of one of its drivers, was held to bind the company.–Malecek v. Tower Grove & L. R. R. Co., 17.

2. *Agent—Principal responsible for negligence of, when.*—The principle is well settled that where an agent is employed to perform or superintend work, the principal is respon-ible to third persons for injuries caused by the neglect or nonfeasance of the agent in doing his work. And this principle obtains, though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment.—Harriman, et al. v. Stowe, 93.

3. *Agent, liability of, to third party for misfeasance.*—In a case of positive misfeasance, and not mere omission of duty, on the part of an agent or employee, he will be directly liable to a third party for injuries resulting therefrom. Thus where an agent undertook to build a trap-door, but did the work so negligently as to cause the injury complained of, action would lie by the injured party not only against the principal but the agent also.—Id.

4. *Corporation, agent of—Authority, how shown.*—It is a settled rule of law that not only the appointment, but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation.—Kiley v. Forsee, 390.

See Corporations, 3; Insurance, Fire, 1; Partnership, 6.

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APPEARANCE; See Justices' Courts, 8; Practice, civil, 2; Practice, civil-Pleading, 6.

ARREST OF JUDGMENT; See Practice, civil, 3.

ASSIGNMENTS.

1. *Assignments, fraudulent—Knowledge as to fraud by assignee.*—A *bona fide* assignee for value will not be affected by the fraudulent intent of his assignor of which he has no knowledge. Knowledge of the mere fact of the assignor's indebtedness at the time of the transfer will not be sufficient to defeat it.—Durkee v. Chambers, 575.

ATTACHMENT.

1. *Attachment—Order of publication—Variance—What not material—When order may be published.*—The fact that the published order in an attachment suit purported to have been made by the order of the clerk instead of that of the court as stated in the original order, will not vitiate a sale of land under it in a collateral proceeding. And a publication ordered by the clerk in vacation after the lapse of two terms from the date of process, and without any new affidavit would be good. (Kane vs. McCown, 55 Mo., 181.)—Johnson v. Gage, 160.

2. *Attachment—Order of publication—Filing papers—Presumption as to.*—The issuance of an order of publication raises the presumption that the petition and other papers in the case had been filed theretofore, without any indorsement thereon of the date of filing.—Id.

3. *Attachment—Jurisdiction—Publication.*—Where in an attachment suit the required affidavit and bond have been filed, and an attachment regularly issued, and land seized and levied on by virtue of the attachment, the court thereby acquires jurisdiction of the case as to the property attached, and a judgment rendered in such cause against the property attached will not be void, although no sufficient publication has been made. (Freeman vs. Thompson, 55 Mo., 183; Holland vs. Adair, 55 Mo., 40.)—Id.

4. *Constable releasing attached property, liable on his bond, when—Measure of damages against constable, what.*—Where property is attached and judgment obtained before a justice, a constable who turns over the proceeds to a third party on mere notice of claim, without proof of title, becomes liable therefor on his bond. And the measure of damages will be the amount and value of the property wrongfully released. (See State to use, etc. v. Langdon, *ante* p. 350.) And where judgment is rendered, an inquiry of damages should be awarded to ascertain that fact.

ATTACHMENT, continued.

The proper course of the claimant in the original suit is to interplead while the attachment is pending, and not afterward.—State, to use v. Langdon, et al., 353.

See Garnishment; Sheriff, 2; Courts, 1.

B.

BAILMENT; See Innkeeper, 1.

BANKS AND BANKING; See Evidence, 8.

BILLS AND NOTES, continued.

1. *Prom. notes—Extension—Surety, when held.*—An extension of time for a definite period was granted to the principal maker of a note without the consent of the surety, and the contract for extension was indorsed on the back of the note. Surety held released.—Germ. Savings Association v. Helmrick, et al., 100.

2. *Promissory notes—Extension—Payment of interest in advance—Discharge of sureties.*—A promise of extension upon a note, in order to discharge a surety thereon, must be such as will prevent the holder from bringing an action against the principal; and the taking of interest in advance will not constitute such a promise.—Hosea v. Rowley, 357.

3. *Promissory note—Agreement for extension—Surety, how affected by, etc.*—An agreement between the principal and payee of a promissory note made at or after maturity, for an extension, in order to discharge a surety thereon, must be a valid and binding agreement which would deprive the payee of the power to sue until after the period of extension; but a mere indulgence, without any consideration passing, would have no such effect.—Hemery v. Marksberry, 399.

4. *Promissory notes—Suretyship—Agreement for usurious interest, etc.*—Generally, where the holder makes with the principal maker a binding contract which varies the terms of a note, without the consent of the surety, the holder knowing of the suretyship, the latter is discharged. But this rule does not cover the case of an agreement without any consideration for the payment of interest at more than ten per cent. where payment was made to depend simply on the personal honor of the maker of the paper.—Id.

5. *Usurious interest on notes—Contract void, how far—Schools—Construed statute.*—A contract for usurious interest on a note does not render the note void *in toto*, but only as to interest upon the amount actually loaned, the legal interest being recoverable for the use of the common schools. (Wagn. Stat. 783, § 5.)—Id.

6. *Evidence—Promissory note—Handwriting proved by comparison, etc.*—In suit on a note where defendant denies its execution under oath, his signature to the note may be proved by testimony of experts on comparison of that signature with his name as attached to the answer, the genuineness of the latter being first established.—Corby, Exr'x, &c., v. Weddle, 452.

7. *Practice, civil—Pleading—Evidence—Note—Denial of execution—Fraud may be shown.*—Under a plea denying the execution of a note, defendant may prove that his signature was procured by fraud.

Generally where an instrument is void *ab initio* and not merely voidable, the plea of *non est factum* is proper. And evidence which shows the paper to be void is admissible under that plea.—Id.

8. *Note—Signature obtained by fraud—Party not liable to innocent holder for value.*—Where one was induced to sign a note under false representations that the paper was a contract for the agency for certain hay forks, *Held*, that no action would lie against him on the note, even in the hands of an innocent holder, for value before maturity. (Martin vs. Smylee, 55 Mo., 377; Briggs vs. Ewart, 51 Mo., 245 affirmed.)—Id.

BANKS AND BANKING, continued.

9. *Partnership—Note given outgoing partner for assets—Suit on in action at law, when proper.*—Where one of two co-partners buys the notes and accounts of the firm at their face value and gives the co-partner his note for the amount with the understanding that where the notes and accounts prove worthless, a rebate *pro tanto* should be made on the purchase note, *held*, that in suit on the note in an action at law, defendant might, where these assets prove valueless, set up the facts to that extent as a defense to the note. No resort would be necessary in the first instance to a bill in equity for the purpose of settling the partnership. (See Russell vs. Grimes, 46 Mo., 410.)—Bethel v. Franklin, et al., 466.

10. *Promissory note—Extension—Discharge.*—An extension granted to the principal debtor in a promissory note in consideration of usurious interest paid in advance, will not operate a release of the surety.—F. & T. Bank v. Harrison, 503.

See Conveyances, 4; Corporations, 7.

BILL OF PARTICULARS; see Mechanic's Lien, 2.

BOND, ATTACHMENT; see Attachment, 4.

BOND, COUNTY, see County Bonds.

BOND, OFFICIAL; see Constable, 2.

BOUNDARIES; see Land and Land Titles, 5.

BURDEN OF PROOF: see Conveyances, 2; Judgment, 1; Subscription, 2.

C.

CLERK, COUNTY; see County Court, 1.

CONDEMNATION OF LAND.

1. *Damages—Condemnation of land.*—Where a statute authorizing the condemnation of land requires the commissioners to "assess the damages which the owner of the land may sustain by reason of such appropriation," the assessment is not confined to the land actually taken. There may be consequential damages which result by reason of the appropriation, which are fairly comprehended within the scope of the law.—Han. Bridge Co. v. Schaubacher, 582.

2. *Condemnation of land—Damages — Consequential — Measure of.* — When nothing but compensatory damages are allowed, the recovery must be confined to the actual damages sustained; and where the damages consisted in depriving the owner of the use of other lands on which were erections and improvements necessary for the use of the lands remaining, which erections and improvements could be moved to said remaining land, and be then as valuable and useful as before, the measure of damages would be the expense of such removal, and the value of the time lost while it was being effected.—Id.

3. *Condemnation of land—Personal examination.*—In a proceeding for condemnation of right of way for a railroad, upon exceptions to the commissioners' report, it not appearing from the record, whether the fact of a personal examination of the land by the commissioners was in issue, the Supreme Court cannot say there was error in the rejection of proofs that the commissioners went upon the ground and viewed it.—Quincy, Mo. & Pac. R. R. v. Ridge, et al., 599.

4. *Condemnation of land—Evidence—Presumption.*—There is no error in the exclusion of testimony for the purpose of sustaining the commissioners' report, to the effect that they were instructed in their duties by the adverse attorneys. The matters of inquiry for the court are; what did the commissioners do in fact, and upon what principles did they arrive at the conclusions reported? Nothing appearing in the record to show how this inquiry was conducted, the action of the court below, in setting aside the report, will be presumed correct. —Id.

CONDEMNATION OF LAND, continued.

5. *Condemnation of land—Reference—Jury.*—Under the act approved March 8, 1873, when the report of commissioners is set aside, the court is authorized to refer the matter to a jury.—Id.

6. *Condemnation of land—Damages.*—In estimating the damages in condemnation for right of way, the jury are to consider the quantity and value of the land taken and the damage done to the whole tract; and from these amounts to deduct the benefits, if any, peculiarly accruing to that tract of land, and not shared by it in common with other lands in the neighborhood.—Id.

7. *Condemnation of land—Damages.*—In condemnation for right of way, the actual value of the land taken is not the measure of damages.—Id.

See Eminent Domain.

CONSIDERATION.

See Land and Land Titles, 8, 19; Railroads, 7, 8, 9, 12, 14, 15.

CONSTABLE.

1. *Constable releasing attached property liable on his bond, when—Measure of damages against constable, what.*—Where property is attached and judgment obtained before a justice, a constable who turns over the proceeds to a third party on mere notice of claim, without proof of title, becomes liable therefor on his bond. And the measure of damages will be the amount and value of the property wrongfully released. (See State to use, etc. v. Langdon, *ante* p. 350.) And where judgmet is rendered, an inquiry of damages should be awarded to ascertain that fact.

The proper course of the claimant in the original suit is to be interplead while the attachment is pending, and not afterward.—State to use v. Langdon, et al., 353.

2. *Constable's bond—Suit on for failure to make proper return—Criterion of damages.*—In action on a constable's bond, for failure to return an execution according to its command, under a proper construction of the statute, (Wagn. Stat., 844-5, §§ 19, 20, 23) plaintiff's measure of damages is not necessarily the amount of the execution with one hundred per centum per annum. The production of the execution may be *prima facie* but not conclusive evidence on this point. But the constable may, notwithstanding, show what amount could in point of fact have been realized on the execution. And the amount of damages actually sustained by plaintiff, with one hundred per cent. is the true measure of damages.—State, ex rel., v. Langdon, 350.

See Execution, 1.

CONTRACTS.

1. *Contracts—Adjoining proprietors—Payment for strip of land and fence—Presumption as to agreements for.*—Where one adjoining proprietor pays another for the use of a strip of land and division fence up to a specified time, and continues to use them afterwards, the law will, without any express agreement to that effect, presume a promise to pay for such further use, at least what they are reasonably worth.—Grigsby v. Fullerton, 309.

2. *Usurious interest on note—Contract void, how far—Schools—Construed Statute.*—A contract for usurious interest on a note does not render the note void *in toto*, but only as to interest on the amount actually loaned, the legal interest being recoverable for the use of the common schools.—(Wagn. Stat., 783, § 5.)—Hennery v. Marksberry, 399.

See Bills and Notes; Conveyances; Corporations, 3, 6, 7, 8; Fraud, 5; Frauds, Statute of; Insurance, Fire; Insurance, Life; Mortgages and Deeds of Trust; Partnership; Railroads, 10; Sales; Sheriff's Sales; Subscription; Sureties.

CONVEYANCE.

1. *Conveyances, voluntary—Made by persons in embarrassed circumstances—Fraudulent in law, when.*—In order to invalidate a voluntary conveyance, it is not necessary that there should be an actual intent to hinder and delay creditors. It is sufficient to show in such case, that the grantor was in embarrassed or doubtful circumstances, and was not possessed of ample means, outside of

CONVEYANCE, continued.

the property conveyed, for the satisfaction of his then existing debts. Such conveyance, under such state of facts, is fraudulent in law as to creditors, at the time of its execution.—Patten v. Casey, et al., 118.

2. *Deed absolute on its face intended as a mortgage—Nature and amount of proof required.*—Although a deed may be absolute on its face, yet if it be shown that it was given merely as a security for debt, courts of equity will decree it to be a mortgage with the right of redemption. And no agreement of the parties can take away that right. But the burden of proof is upon the party who alleges that such a deed is a mortgage, and the proof must be clear and convincing, leaving no room for reasonable doubt as to that fact.—Worley v. Dryden, 226.

3. *Tax deed—Failure of deed to recite manner of notice, effect of.*—A tax deed which merely recites that "due notice" was given of the sale, without reciting the manner of the notice, is absolutely void and will pass no title.—Smith v. Funk, 239.

4. *Deed, quit-claim—Purchase money—Note for, procured by fraud—Defenses.*—Where one is induced, by fraudulent representations, to accept a quit-claim deed of certain land, such fraud will constitute a good defense to a suit on a promissory note given for the purchase money.—Id.

5. *Sheriff's deed—Cannot be attacked collaterally, when.*—In ejectment for land bought at sheriff's sale, mere irregularities which do not render the deed absolutely void, cannot be inquired into.—Hewitt v. Weatherby, 276.

6. *Dower—Seizin of husband.*—Where the seizin of the husband is for a transitory instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower attaches; and this principle also applies where the conveyance is effected by two deeds, provided they are delivered at the same time, because they take effect from delivery only.—Fontaine v. Boatmens' Savings Inst., 552.

7. *Conveyances—Execution—Acknowledgment—Delivery—Presumption.*—A deed is not generally executed until it is acknowledged, and till that takes place there is no presumption of delivery.—Id.

See Evidence, 9; Husband and Wife, 1, 2, 4; Land and Land Titles; Sheriff's Sales; Wills, 1.

CONVEYANCES, FRAUDULENT; See Conveyances, 1; Fraud.

CORPORATIONS.

1. *Evidence—Corporations—Admissions by agent bind when.*—Language used by the superintendent of a street railway company, admitting and justifying an assault of one of its drivers, was held to bind the company.—Malecek v. Tower Grove, & L. R. W. Co., 17.

2. *Corporations—Exemplary damages.*—It is the well settled law of this State, that corporations, like natural persons, are liable in exemplary damages when the facts of the case are of a character to warrant them.—Id.

3. *Corporation—Officer of, exceeding his powers, company bound, when.*—It is well settled that where a person deals with an officer of a corporation who assumes authority to act in the premises, and no irregularity or want of authority is brought to the knowledge of the party so dealing, and nothing occurs to excite suspicion of such defect, the corporation is bound, although the agent exceeded his powers.—Lungstrass v. Germ. Ins. Co., 107.

4. *Corporations—Capital stock, increase of—Meeting of stockholders—Certificate, defects in—Subsequent subscription.*—Where a meeting of stockholders, touching increase of capital stock, is held pursuant to the statute, (Wagn. Stat., 335–6, § 12,) but the certificate of the proceedings fails to state "the amount of capital stock paid in" and "the whole amount of the debt and liabilities of the company," such defects will not defeat a recovery for the amount of his subscription against a stockholder, where it appears, that his shares were subscribed subsequent to the date of the certificate, and the facts are sufficient

CORPORATIONS, continued.

to raise the presumption that defendant subscribed, with a knowledge of the defects and waived the same. But the mere subscription without any payment thereon, or any other act of recognition, will not bind the defendant.—Kans. City Hotel Co. v. Hunt, 126.

5. *Corporations—Cessation of business—Right to sue.*—The cessation of active business on the part of a corporation, does not imply a dissolution of the company, so as to deprive it of the right to bring suit.—State Nat. Bank v. Robidoux, 446.

6. *Corporations, acts of, void in part or in whole, rule touching.*—If a corporation does an act not within the authorized objects of its charter, or performs an authorized act by a prohibited method, the acts will be wholly void. But if the departure or violation apply only to the measure of extent or quantity in an authorized procedure, then the act will be valid up to the prescribed limit, and void only as to the excess.—F. & T. Bank v. Harrison, 503.

7. *Corporations, loans by—Usurious interest.*—The statute authorizing the formation of banking corporations with power to loan money "at a rate of interest not to exceed ten per cent. per annum," does not render void a note taken for a loan at a greater rate of interest.—Id.

8. *Corporations, usurious contract with, governed by the general law.*—Usurious contracts made with corporations are governed by the general law relating to interest and usury; and suits upon them must be disposed of in like manner as in cases of such contracts between private persons.—Id.

See Corporations, Municipal; Insurance, Life; Insurance, Fire; Powers, 1, 2; Railroads; Sales 1.

CORPORATION, MUNICIPAL.

1. *Damages—Municipalities—Failure to repair streets—Measure of liability.*—City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public, and where at the point of accident the street was abundantly wide and well repaired to enable persons, with the exercise of ordinary care, to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.—Brown v. Mayor, &c. of Glasgow, 156.

2. *Corporations, municipal—Street improvements—Ordinance, what necessary to empower engineer.*—The charter of the city of St. Joseph provided that whenever the City Council should order macadamizing, guttering, etc., and they should "deem the performance of the work by contract, to be advantageous," it should be the duty of the city engineer to advertise for proposals; *Held*, that a subsequent ordinance requiring the engineer to so advertise was equivalent to an averment by the council, that such work under contract was advantageous without any further ordinance in terms directing the work to be so done. (Young vs. City of St. Louis, 47 Mo., 492.)—Kiley v. Forsee, 390.

3. *Corporation, municipal—Deputy engineer, appointment of—Filing of certificate with register, etc.*—Where a city charter authorized the city engineer to appoint a deputy, but provided that the appointment should be in writing and filed with the register, and the proof showed that the deputy was appointed and acted and was recognized as such, the omission to file the certificate would not vitiate his acts.—Id.

4. *Corporation, agent of—Authority, how shown.*—It is a settled rule of law that not only the appointment, but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation.—Id.

COSTS.

1. *Judgment for costs not final.*—A judgment for costs is not a final judgment from which an appeal will lie. (Boggess v. Cox, 48 Mo., 278.)—Dale, v. Wright, 110.

See Justices' Courts, 2.

COUNTY BONDS.

1. *County bonds—Phelps county—Issue of for school of mines, etc.—State Constitution—Injunction, etc.*—The issue of bonds by Phelps county, under the act of January 24th, 1870, (Adj. Sess. Acts, 1870) in aid of the school of mines and metallurgy, at Rolla, was a lending of the credit of the county to a corporation, within the meaning of § 14, Art XI of the State Constitution, and a law authorizing the issue of said bonds without the sanction of two-thirds of the voters of the county was void. That section was not intended to be limited to private corporations, but applies also to those of a public nature.

Where a county orders the issue of such bonds without the popular vote, injunction is the proper remedy.—State v. Curators State University, 178.

COUNTY COURT.

1. *County Court—Settlement of accounts of delinquent clerk—Notice, etc.*—The County Court cannot proceed under the statute (Wagn. Stat., 412, §§ 19, 20, *et seq.*) to settle the accounts of a delinquent clerk, after expiration of his term of office, in a summary manner without notice; the statute applies only to persons in office.—Ray Co. v. Barr, 290.

2. *Notice of proceedings where law is silent.*—Where the law is silent as respects notice to a person whose interests are affected by a proceeding in court, notice is always implied, and he must be brought into court in some appropriate way before he will be bound.—Id.

COURTS.

1. *Courts, co-ordinate—Conflict of authority as to custody of property under attachment or execution.*—In case of a conflict of two co-ordinate courts, as to the jurisdiction over property, it is the universal rule that the tribunal in which jurisdiction first attaches by the seizure and custody thereof, under its process, must prevail.—Metzner v. Graham, 404.

COURT, CALDWELL COMMON PLEAS; see Practice-Supreme Court, 2.

COURTS, COUNTY; see County Court; Railroads, 1.

COURT, PROBATE; see Administration; Wills.

CRIMES AND PUNISHMENTS; see Criminal Law; Perjury; Practice, Criminal; Revenue, 3; Usury.

CRIMINAL LAW.

1. *Criminal law—Murder, indictments for—Malice may be inferred.*—In indictments for murder, proof of willfulness and deliberation need not be express or positive, but may be deduced from all the facts attending the killing; and if the jury can reasonably and satisfactorily infer from all the evidence, the existence of the intention to kill and the malice of heart, it will be sufficient. But if malice and premeditation are not proved, the law presumes the killing to be murder in the second degree.—State v. Underwood, 40.

2 *Criminal law—Self defense.*—A person who seeks and brings on a difficulty cannot avail himself of the right of self defense in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray.—Id.

3. *Criminal law—Mutual combat—Murder.*—Where persons by mutual understanding engage in a conflict and death ensues to either, the slayer will be guilty of murder.—Id.

4. *Criminal law—Indictment for forging judge's certificate—Allegations as to county wherein crime occurred, etc.*—An indictment for forging a judge's certificate to a fee bill (Wagn. Stat., 490, § 15,) is not bad by reason of the fact that it charges that the prisoner forged the certificate, and also, that he "caused and procured the same to be forged." The latter clause might be stricken out as surplusage. And under our liberal system of pleading, an averment in the indictment that the forged instrument purported to be the certificate of "A. B., judge of the ninth judicial circuit," is sufficient without the further affirmative allegation, that A. B. was judge of that circuit. But the failure of such indictment to set forth in what county or circuit the cause wherein the fee bill issued was tried, or in what county or circuit the costs or fee accrued, would render the complaint as fatally defective.—State v. Maupin, 205.

D.

DAMAGES.

1. *Corporations—Exemplary damages.*—It is the well settled law of this State, that corporations, like natural persons, are liable in exemplary damages when the facts of the case are of a character to warrant them.—Malecek v. Tower Grove & L. R. Co., 17.

2. *Railroads—Action for damages in name of owner—Constr. Stat.*—Suit against a railroad company, to recover double damages for injuries to stock, need not be brought in the name of the State, under § 42 of the Railroad Act, (Wagn. Stat., 310) but may be instituted in the name of the owner, under § 43 (p. 310-11).—Sparr v. St. L., K. C. & N. R. R. Co., 152.

3. *Damages—Municipalities—Failure to repair streets—Measure of liability.*—City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public; and where at the point of accident the street was abundantly wide and well repaired to enable persons, with the exercise of ordinary care, to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.—Brown v. Mayor, Councilmen and Citizens of Glasgow, 156.

See Attachment, 4; Condemnation of Land; Constable, 2; Eminent Domain; Evidence, 3; Justices' Courts, 5; Railroads, 12, 15; Trover, 1.

DEATH OF PARTY; See Practice, civil—Actions, 1.

DEED; See Conveyance; Land and Land Titles; Mortgages and Deeds of Trust.

DEED OF TRUST; See Mortgages and Deeds of Trust.

DEDICATION TO PUBLIC USE; See Condemnation of Land; Land and Land Titles.

DEPOSITIONS; See Evidence, 5; Practice, civil, Pleading, 11.

DEMURRER, see Practice, Civil, Pleading 10.

DESCENT AND DISTRIBUTIONS; See Homestead, 2.

DESCRIPTION; See Land and Land Titles; Wills.

DIVORCE.

1. *Divorce obtained in Indiana on order of publication—Effect of as to wife's claim of dower.*—A decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, operates as a divorce in his favor in this State, so as to prevent his wife from claiming her dower in lands owned by him here. The decree when so pronounced is a judgment *in rem* and when not affected by fraud is valid everywhere; but when rendered on an order of publication can have no effect *in personam* extra-territorially.—Gould, et al. v. Crow, 200.

2. *Divorce for wife's fault—Statute touching—Dower rights.*—The statute of Missouri, barring the wife's claim for dower after divorce granted by reason of her fault, (Wagn. Stat., 541, § 14) applies to all divorces, whether obtained in this or any other State, and whether obtained on personal service or by order of publication.—Id.

DOWER.

1. *Dower—Alienation of property by husband—Effect of.*—The alienation of eal estate by the husband, whether voluntary as by deed or will, or involuntary, as by proceedings against him or otherwise, will confer no title on the lienee, as against the wife in respect to her dower.—Grady v. McCorkle, et l., 172.

2. *Dower—Suit for specific performance estops claim for, when.*—In a suit for specific performance of a contract to convey land, brought against the widow and heirs of the owner, where the dower of the widow is not in any manner determined or litigated, or drawn in question by the proceedings, a decree for plaintiff will not estop the widow from afterward recovering her dower.—Id.

DOWER, continued.

3. *Dower—Seizin of husband.*—Where the seizin of the husband is for a transitory instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower attaches; and this principle also applies where the conveyance is effected by two deeds, provided they are delivered at the same time, because they take effect from delivery only.—Fontaine v. Boatmens' Savings Inst., 552.

See Divorce, 1, 2.

DRAINAGE; See Railroads, 11, 12.

E.

EJECTMENT.

1. *Practice civil—Ejectment—Special verdict.*—A suit in ejectment for a certain tract of land without claim for further relief is not one wherein special issues of fact may be submitted to the jury. (Wagn. Stat., 1040–1, §§ 11, 12, 13; 1042, §§ 20, 22.)—Major's Heirs v. Rice, 384.

2. *Ejectment—Labeaume survey and patent of 1852 prevailed over Lirette confirmation and survey of 1826—Brazeau reservation—Magwire vs. Tyler, referred to.*—In ejectment for certain land in St. Louis, plaintiff's claim was based originally on a confirmation made in 1810 to Labeaume, "according to the Soulard survey in 1799." The first survey of the tract did not include the land in dispute. But it was set aside and a new survey made retracing the Soulard survey, which embraced that tract, and on this new survey, a patent was issued to Labeaume in 1852. Defendant claimed, by virtue of a confirmation to Lirette of "one by forty arpents" made in 1816 by act of Congress, under which the land in controversy was located by a United States survey in 1826. *Held*, that the Labeaume confirmation being of a definite tract of land, took immediate effect, and that the subsequent proceedings by survey and patent related back to the proceedings before the board in 1810 and prevailed against the confirmation to Lirette. The case of Magwire vs. Tyler originated in a dispute about locality, and in that case the titles of Brazeau & Labeaume were synchronous, and originated before the same board, and the survey locating the Brazeau tract within the Labeaume confirmation, was in that case held correct, but that decision did not determine the last Labeaume survey and patent issued thereon, in 1852, to be invalid, except as to the Brazeau reservation.—Tyler v. Wells, 472.

3. *Ejectment—Sheriff's Deed—Land and land titles.*—In ejectment the defendant's introduction of a sheriff's deed of the plaintiff's title, is an admission that the plaintiff owned the property at the date of the execution sale.—Rumfelt v. O'Brien, 569.

4. *Ejectment—Title—Judgment—Possession.*— The purpose of the action of ejectment is to try title, and it is not error for the judgment to declare ownership in the plaintiff, when the petition demands only possession of the premises.—Clarkson v. Stanchfield, 573.

5. *Ejectment—Possession—Disclaimer—Judgment.*—A "disclaimer" of possession by defendant in ejectment, is nothing more than a denial of one of the facts necessary to sustain the plaintiff's action. The finding for the plaintiff on the issues is conclusive against the defendant as to possession, and entitles the plaintiff to judgment.—Id.

6. *Ejectment—Verdict in—Possession of defendant—Finding as to.*—Under the statute relating to ejectment, (Wagn. Stat., 559, § 8.) the verdict of a jury that the right of property and right of possession is in plaintiff, is sufficient where defendants possession at the time of commencing suit is denied in his answer.—Caldwell v. Stephens, et al., 589.

See Railroads, 1, 8, 9; Streets, 1.

EMINENT DOMAIN.

1. *Eminent domain—Condemnation of private property—Compensation—Railroads—Pre-payment as a condition precedent to surrender of land by owner—Acquiescence by owner in expenditures—Estoppel—Ejectment, etc.*—Private property cannot be taken even in the exercise of eminent domain, without compensation to the owner; and before the title can be absolutely vested by virtue of proceedings for condemnation, payment becomes indispensably necessary. But where a railroad company commences proceedings under the statute for condemnation of private property, and the commissioners award a given sum as damages, and the court decrees, that on payment thereof, title shall vest in the company, and the owner files his objections to the award and procures a higher assessment, but does not insist on pre-payment as a condition precedent to a surrender of the land, nor attempt to obstruct or in any way impede the progress of the work, and by such acquiescence, induces the company to expend large sums upon the road, he cannot maintain ejectment against the company simply on the ground of such failure of pre-payment. In the case supposed, of course the strict title will not pass to the company till the paying of the damages awarded.

The owner will, however, have other and sufficient remedies, *e. g.*, a court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages are paid from the earnings of the road.—Provolt v. Chicago, R. I. & Pac. R. R. Co., 256.

See Condemnantion of Land; Streets, 1.

EQUITY.

1. *Equity—Resulting trusts as to land—Parol statements—Evidence touching.*—In suit against the heirs of a deceased person to establish a resulting trust as to land, in plaintiff's favor, on the basis of parol admissions, the evidence to warrant a recovery must be so emphatic and unequivocal as to banish every reasonable doubt from the mind of the chancellor respecting the existence of the trust. Evidence as to such statements unless strongly corroborated will be insufficient.—Kennedy v. Kennedy, 73.

2. *Equity—Special verdict—Chancellor not bound by.*—The chancellor is not bound by the verdict of a jury on special issues submitted to them. | Durkee v. Chambers, 575.

3. *Equity—Decree—Reversal of action of Supreme Court—What proper.*—Where the order or decree of a chancellor is reversed on appeal, the Supreme Court ought to render such decree as may be right upon a review of the whole record.—Id.

See Eminent Domain, 1; Fraud; Homestead, 3; Husband and Wife, 2; Land and Land Titles, 8, 9; Landlord and Tenant, 3; Partnership; Practice, civil, Trials, 11; Trusts and Trustees.

ESTOPPEL; See Eminent Domain, 1; Land and Land Titles, 11; Railroads, 6, 7; Sales, 1.

EVIDENCE.

1. *Evidence—Corporations—Admissions by agent, bind when*—Language used by the superintendent of a street railway company, admitting and justifying an assault by one of its drivers, was held to bind the company.—Malecek v. Tower Grove & L. R. W. Co. 17.

2. *Witnesses—Testimony of wife when substantially a party — Constr. stat.*—Section 5 of the Witness Act (Wagn. Stat., 1372–3,) does not preclude the wife from testifying where she is a substantial party to the suit.—Harriman, v. Stowe, 93.

3. *Suit for damages—Subsequent declarations, when res gestæ.*—In suit to recover for injuries, where the casualties and declarations touching the same formed connecting circumstances, although some little time may have intervened between them, the declarations are admissible as part of the *res gestæ*.–Id.

EVIDENCE, continued.

4. *Evidence—Confession made while in charge of an officer—When admissible.*—The mere fact that a prisoner is in charge of an officer at the time a statemen- or confession is made, is not sufficient to render the same inadmissible in evil dence. It must further appear that it was induced by hope, on the one hand, or by fear or intimidation on the other.— State v. Carlisle, 102.

5. *Evidence—Deposition—Signature of witness—What sufficient.*—Where, from any cause, a deponent is unable to sign his own name, his signature written by another, at his request, is, in effect, a signing by himself, and is a sufficient compliance with the statute. (Wagn. Stat., 1078, § 25.)—Id.

6. *Evidence—Admissions—Other statements must be taken in connection with.*—To entitle admissions to be received in evidence, they must be taken together with all that was said at the same time and place, whether the remainder be against or for the person making them. But it is for the jury to attach what credit they see proper to the different statements, or parts of statements, both *pro* and *con*.—Id.

7. *Evidence—Contents of lost record—Nature of action to prove.*—The general rule is, that if a record is lost or destroyed, its contents may be proved like those of any other instrument. And the party may proceed by his common law action without resorting to the statutory remedy.—Parry v. Walser, Adm'r, 169.

8. *Evidence—Volume of laws—Certificate of Secretary of State, etc.*—The certificate of the Secretary of State of Virginia, attesting a certain volume of the laws of that commonwealth, stated the title of the book to be "The Code of Virginia," etc., "published pursuant to law." * * Certificate held to show sufficiently that the volume was published by the authority of the State of Virginia.—State to use v. Williamson, 192.

9. *Evidence—Banks, accounts of, how proved—Testimony of clerks and book-keepers, etc.*—Where the testimony of the clerks and book-keepers of a bank showed that the books were accurately kept, and that by the universal custom in the bank, entries were made and the books written up each day, from the checks of the customer or the tickets of the teller, and that the books were then balanced to verify their accuracy, *held*, that the books may be used in evidence to prove the accounts of the bank with its depositors.—Smith v. Beattie, 281.

10. *Evidence—Loss of deed, proof of as to—Secondary evidence, etc.*—Where a deed was attached to certain depositions, and the package duly enveloped sealed, directed and stamped, and placed in the mail, but failed to reach its destination, and was never heard of afterwards: *Held*, that the loss was sufficiently established to let in secondary evidence touching the contents of the deed.—Shaw v. Pershing, 416.

11. *Witness—What no ground for refusal to testify.*—It is no ground for a witness' refusal to testify, that his testimony is sought for the purpose of making a civil case against him. Every man's knowledge of facts which may be material to the administration of justice is, subject to certain exceptions of personal privilege, the property of the law. *Ex Parte*, James E. Munford, 603.

12. *Witness—Notary Public may enforce attendance of.*—If a suit be pending, a notary public may enforce the attendance of witnesses to give their depositions, and may compel them by imprisonment to answer any questions not violative of personal privilege. But the officer cannot exercise such powers if no suit be pending; and this fact may be inquired into in a proceeding upon *habeas corpus*. *Id.*

See Administration, 5; Bills and Notes, 6, 7; Ejectment, 3; Equity, 1; Land and Land Titles, 1, 2, 12, 13, 14; Lease, 1; Mechanic's Lien, 4, 5; Perjury, 1; Practice, civil, Pleading, 8; Practice civil, Trials, 8, 10, 14; Practice, Supreme Court, 1, 4; Sheriff's Sales, 1; Venue, 4; Wills, 2; Witnesses.

EXECUTION.

1. *Execution—Exemption—Constable— Garnishment.*—The exemption right of a debtor in execution must be protected by the constable, whether they apply to property seized or to debts garnished.—State to use v. Barada, 562.

2. *Execution—Garnishment—Claim by debtor—Return.*—The officer holding an execution is bound by law to apprise the debtor of his rights, and the powers conferred upon him are ample to protect them in every possible case. If there be a garnishment upon which the debtor makes his selection and claim, the officer must show the facts in his return upon the execution, with the debt or amount reserved and set over to the defendant.—Id.

See Constable, 2; Garnishment; Justices' Courts, 1; Sheriff, 1, 2.

EXEMPTION; see Execution, 1, 2; Homestead; Justices' Courts, 7.

F.

FENCE.

1. *Division fences—Removal of—Constr. Stat.*—A division fence, within the meaning of the act of 1869 (Wagn. Stat., 633), is one erected on the boundary line between adjoining proprietors; and not one erected by one of them on his own land although near and parallel to the boundary line; and a fence of the latter description may be removed by the owner, after giving six months notice. (Wagn. Stat., 707, § 87.)—Jeffries v. Burgen, 327.

2. *Partition fences—Adjoining proprietors—Right of contribution.*—Under our statute, (Wagn. Stat., 633, § 1) where the owner of land puts up a sufficient fence on his line, and the adjoining proprietor afterwards uses it as a part of his own inclosure, the builder of the fence is entitled to recover from the adjoining proprietor half of the value of the fence; and if the builder sells his land before he has recovered such contribution, the right of recovery passes to his grantee.—Brawner v. Langton, 516.

See Railroads, 2, 5, 13.

FOREIGN JUDGMENT, see Judgment, 2, 6; Justices' Court, 4.

FORGING; see Criminal Law, 4.

FRAUD.

1. *Practice, civil—Fraud in fact—Question for the jury.*—Upon mere questions of fraud in fact, the Supreme Court will be reluctant to interfere with the verdict of a jury.—Wilson, et al., v. Maxwell, 146.

2. *Injunction—Fraud, unfair advantage gained by, in law court—Equity will interfere.*—Nothing is better settled than that, where by mistake or fraud, a party has gained an unfair advantage in proceedings in a Court of law, which must operate to make the Court an instrument of injustice, as where default was taken after other arrangements had been made between counsel for the disposition of the case, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus gained.—Bresnehan v. Price, assignee, 422.

3. *Note—Signature obtained by fraud—Party not liable to innocent holder for value.*—Where one was induced to sign a note under false representations that the paper was a contract for the agency for certain hay forks, *Held*, that no action would lie against him on the note, even in the hands of an innocent holder, for value before maturity. (Maitin v. Smylee, 55 Mo,, 377; Briggs v. Ewart, 51 Mo., 245 affirmed.)—Corby, Exr. v. Weddle, 452.

4. *Fraud—Misrepresentations—Ignorance of facts.*—It is not material whether or not the person making false representations upon which another acts to his own disadvantage knows them to be false; the assertion to the injury of another, of something not known to be true, is equally reprehensible, in law as in morals, with the assertion of that known to be false.—Pomeroy v. Benton, 531.

FRAUD, continued.

5. *Equity—Fraud—Contracts, construction of.*—A Court of Equity looks not so much at the legal formalities with which a transaction is clothed as to its very pith and substance; and where a contract is in form broad enough to cover many things not in terms expressed upon its face, but it is manifest that the minds of the parties never met and concurred in reference to these matters, and where fraud has been practiced, equity will disregard mere technical forms and only attach to the contract the effect which both parties had in view at the time of its execution and delivery.—Id.

6. *Assignment, fraudulent—Knowledge as to fraud by assignee.*—A *bona fide* assignee for value will not be affected by the fraudulent intent of his assignor, of which he has no knowledge. Knowledge of the mere fact of the assignor's indebtedness at the time of the transfer will be not sufficient to defeat it.—Durkee v. Chambers, 575.

See Bills and Notes, 7; Conveyances, 1, 4; Conveyances, Fraudulent; Frauds, Statute of; Fraudulent Misrepresentations; Judgment, 1, 6; Sales, 1, 2.

FRAUDS, STATUTE OF.

1. *Statute of frauds—Parol contract for rescission of sale of lands.*—A parol contract for the purchase of lands is within the express provisions of the statute of frauds; and where there are no facts connected with the purchase which create any resulting trust or equitable right of redemption, a proceeding in equity will not lie for its rescission.—Culligan v. Wingerter, 241.

See Mortgages and Deeds of Trust, 8.

FRAUDULENT MISREPRESENTATIONS.

1. *Fraudulent misrepresentations—Negligence of vendee—Plea of—Parties must be on equal footing.*—Generally, where the courts have refused to uphold the defense of fraudulent misrepresentations of the vendor, basing the refusal on negligence of the vendee in ascertaining the facts, the case referred to sales of land, and both parties had equal opportunities of information. When vendor and vendee do not occupy an equal footing in this respect, the plea of negligence will not avail.—Wannell v. Kem, 478.

G.

GARNISHMENT.

1. *Garnishment—Wages—Appraisement.*—Debts and wages garnished by a constable and claimed by the debtor in execution to be exempted, are not required to be appraised in the manner provided for property levied upon.—State to use v. Barada, 562.

See Executions, 1, 2.

GIFT.

1. *Gift by parol—What words necessary to constitute.*—To constitute a parol gift, there must be a giving or actual transfer by words, and not mere words that would signify an intent to transfer in the future.—Spencer v. Vance, 427.

GUARDIAN AND WARD.

1. *Curator—Final settlement—Suit by sureties against public administrator.*—The final settlement of a curator with his ward is a lien on the real estate of the curator, to the extent of the indebtedness shown by the settlement; and the failure of a public administrator having the curator's estate in charge, to state the fact of such lien in his petition for the sale of the land, as required by statute, Wagn. Stat. 95, § 11) would constitute a breach of his bond, but would not render him liable thereon to the sureties on the curator's bond for the sums they had been compelled to pay by reason of the default of the curator. The damages on such proceeding would be too remote and consequential.—State to use of Lovell v. Todd, 217.

See Judgment, 3.

H.

HOMESTEAD.

1. *Homestead bought after indebtedess accrued, with proceeds of former homestead.*—Under a proper construction of the Homestead Act, (Wagn. Stat., 698, §§ 7, 8, 9,) a homestead purchased with the housekeeper's means is not exempt from being taken for a debt contracted before its purchase and the filing of the deed for it, unless such homestead is acquired by a sale of a previous one. It is immaterial whether the homestead was acquired directly or indirectly from the former homestead; but it must be procured with the proceeds derived from the sale of the homestead proper and not other land owned in connection with the homestead tract.—Farra et al. v. Quigly, 284.
2. *Homestead—Estate of widow a fee simple—Law as to inheritance of—Statute of sister States—Construction of.*—It is a well settled practice to construe foreign laws as the courts of the country where they originated have construed them; and where such laws, whether of a foreign country or of a sister State, are adopted here and made a part of our code, the presumption is that they are adopted with the construction already given by the foreign courts or sister State, where they had their origin. Hence, as the homestead law is a literal copy of a Vermont statute and the 5th section (Wagn. Stat., 698,) has been construed by the Supreme Court of Vermont, *Held*, in accordance with such Vermont decision, that under said section 1, where the husband dies, seized of a fee in the homestead, the wife has not merely a life estate, but a fee simple absolute therein, and on her death it goes to her heirs several or collateral, to the exclusion of the husband's heirs.

The court inclined to the opinion that where there were minor children of the husband by a former marriage, and the widow died before their majority, the title would go to them until they came of age, and then to the heirs of the deceased husband.—Skouten v. Wood, 380.

3. *Homestead—Equity—Cloud on title.*—A bill in equity will lie to secure relief from a cloud cast on title to real estate, by a sale under execution of property exempt under the homestead law. And such jurisdiction in equity is not ousted by the fact that a legal remedy is afterwards afforded, unless abolished by some prohibitory legislative enactment.—Harrington v. Utterback, et al. 519.

HUSBAND AND WIFE.

1. *Married woman—Power to convey where husband lives abroad.*—Where the husband is an alien, always residing beyond the realm, the wife may convey her estate in the same manner as a *feme sole*.—Galagher v. Delargy, 29.
2. *Married woman—Deed of—Liability on covenant—Subsequent promise.*—Where a husband and wife convey the estate of the latter, under the statute of Missouri, (Wagn. Stat., p. 273, § 2) she cannot be held in an action on her covenant, therein contained, against incumbrances. And a subsequent promise to pay the indebtedness guaranteed by said covenant, is void for want of consideration.—State Nat. Bank of St. Joseph v. Robidoux, 446.
3. *Married woman—Separate estate—Payment of taxes on—Claim for in equity—Assignment of.*—Payment of taxes on the separate estate of a married woman, at her instance, and perhaps even with her assent, will constitute a claim in equity against her estate, and such a claim may be assigned.—Id.
4. *Married woman—Conveyance of—Notary's certificate—Statutory requirements touching explanation and examination, etc., imperative.*—In suit upon a mortgage given by a married woman upon her real estate, the certificate to her acknowledgment is not conclusive; and where she testifies that she was not by the notary made acquainted with the contents of the deed, nor examined apart from her husband, nor asked if she executed it voluntarily, it is improper to show her knowledge of the deed prior and subsequent to her examination, and, that, in point of fact, she was not influenced by compulsion or improper means by her husband. The statutory requirements touching such examination and information by the notary are imperative, and must be complied with as a necessary pre-requisite to a valid conveyance of her property.—Wannell v. Kem, 478.

See Divorce; Dower; Evidence, 2; Homestead; Judgment, 10; Practice, civil—Parties, 1.

I.

MENTINDICT; See Practice, Criminal.

INFANTS; See Judgments, 3.

INJUNCTION.

1. *Injunction—Fraud, unfair adeantag gained by, in law court—Equity will interfere.*—Nothing is better settled than that, where, by mistake or fraud, a party has gained an unfair advantage in proceedings in a court of law, which must operate to make the court an instrument of injustice, as where default was taken after other arrangements had been made between counsel for the disposition of the case, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus gained.—Bresnehan v. Price, assignee, 422.

See Streets, 1.

INN-KEEPER.

1. *Inn-keepers—Liability of for valuables stolen from transient guests—Safes—Notices, posting of, etc.*—An inn-keeper is liable for valuables stolen from the sleeping room of one who is a transient guest and not a permanent boarder, notwithstanding the fact that the hotel contains an iron safe designed for the bestowal of such articles, if notice thereof posted in the rooms is in small type and not in large or plain English type, as required by the statute. (Wagn. Stat., 710, § 1.)—Porter v. Gilkey, 235.

INSTRUCTIONS; See Practice, civil—Trials; Practice, Criminal, 7.

INSURANCE, FIRE.

1. *Fire Insurance Companies—Premium, receipt of by agent—Entry on books—Contract, what acts close.*—Where the agent of a fire insurance company accepts a policy sent him by it and charges himself on his agency books with the premium, the contract between him and the company is consummated although neither the premium nor a letter of acceptance is forwarded by him to his principal.—Lungstrass v. Germ. Ins. Co., 107.

2. *Fire insurance—Waiver of notice of loss by company—Averment as to, unnecessary.*—In suit against an insurance company for loss by fire, proof as to waiver of notice of loss may be made without any special averment of that fact in the pleading.—Schultz v. Merchant's Insu. Co., 331.

3. *Fire insurance—Application—Statement in as to tenants, not a warranty.*—The statement in an application for a policy of fire insurance, that the building to be insured was tenanted, is not a warranty. The extent to which such a representation would affect the risk is a question to be determined by the jury from all the facts of the case; whereas a warranty is to be established without regard to its effect on the risk.—Ib.

4. *Fire insurance—Suit on policy of—What allegations sufficient.*—In suit on a fire insurance policy, the petition need not specifically allege notice and proof of loss. A simple averment that plaintiff "duly fulfilled all the conditions of said policy on his part," is sufficient. (Wagn. Stat., p. 1020, § 42.)—Richardson v. North Mo. Ins. Co. of Macon, Mo., 413.

INSURANCE, LIFE.

1. *Life Insurance, suit against—Corporation—Cause of action accrues, when—Where suit may be begun.*—Under the statute authorizing suits to be brought against a corporation in the county "where the cause of action accrued," (Wagn. Stat., 294, § 28,) the cause of action against a Life Insurance Company accrues at the place of death, and suit may be commenced there notwithstanding that the contract of insurance may have been entered into in another county.—Rippstein v. St. L. Mut. Life Ins. Co., 86.

2. *Life Insurance Company, suit against—Formal proofs waived, how.*—In a suit on a life insurance policy, a defense charging death by *delirium tremens*, which allegation, if true, exempted the company from all liability, amounted to a waiver of the formal proofs required by the by-laws of the company.—Id.

INTEREST; See Bills and Notes, 2, 4, 5, 10; Usury.

INTERPLEA; See Attachment.

J.

JEOFAILS; see Practice, Civil—Parties, 1.

JUDGE; see Administration, 1.

JUDGMENT.

1. *Judgment—Fraud and irregularity.*—A party seeking to set aside a judgment for fraud or irregularity must take the burden of proof of establishing his charge.—Acock vs. Acock, 154.

2. *Judgment—Transcript of—Suit upon—Original writ—Mode of service, etc.*—In suit brought in this State, on a judgment given in the State of Virginia, the transcript is not rendered inadmissible by reason of the fact that the original writ of summons as shown thereon, was not under seal; and where service of that writ purported to have been made upon the wife of the defendant, at his residence, he not being found at his usual place of abode, etc., the transcript is not inadmissible under a fair construction of the laws of Virginia on account of its failure to show that she was a free white person, nor was it objectionable, as failing to show, that the writ was served at defendant's usual place of abode, or that service was made in the officer's bailiwick. It cannot be presumed against the judgment of a court of general jurisdiction, that service was made by an officer of the court outside of the county. At least, such cannot be presumed to be the case in a collateral proceeding.—State to use v. Williamson, 192.

3. *Res adjudicata judgment must be on merits.*—A former judgment to operate as *res adjudicata*, must be a judgment on the merits.—Verhein v. Schultz, 326.

4. *Judgment—Irregularity in, not void collaterally, when.*—Where suit was brought against several defendants, of whom a portion were minors, and judgment was rendered against the infants without their appearance by guardian or curator, or where a judgment was rendered, on notice of publication against non-resident defendants at the same term at which they were notified to appear, *held*, that in cases of that character although such judgments might be set aside for irregularity in direct proceedings for that purpose, they were not void, collaterally, as to parties brought within the jurisdiction of the court.—Bailey, v. McGinniss, 362.

5. *Sale of land after satisfaction of judgment.*—It is well established that if a judgment be satisfied, the power to sell under it ceases, and in case of sale the purchaser gets no title. (Durette v. Briggs, 47 Mo., 356.)—Durfee v. Moran, 374.

6. *Judgments of other States may be impeached for fraud.*—A judgment of a court of record of a sister State, where the parties appear or are duly summoned, imports absolute verity, and cannot be impeached at law. But in equity, judgments, whether foreign or domestic, may be declared void for fraud, in actions brought to enforce them in this State. And in suit brought on a foreign judgment obtained by fraud, that plea may be set up, and will constitute a complete bar to recovery.—Ward v. Quinlivin, 425.

7. *Judgment affirmed.*—Judgment affirmed because manifestly for the right party, although error appears in the record.—State to use v. Barada, 562.

8. *Judgment—Recitals in—Evidence—Notice.*—A recital in a judgment that the defendant has been "duly served with process," is conclusive against him on the question of notice. The judgment cannot be impeached by the introduction of other parts of the record which fail to show when or how the process was served.—Rumfelt v. O'Brien, 569.

9. *Judgment—Void for uncertainty as to parties.*—In a suit against two defendants, a judgment against "the defendant" is void.—Caldwell v. Stephens, 589.

10. *Judgment against married woman.*—A general judgment for damages and costs against a married woman is improper.—Id.

JUDGMENT, continued.

11. *Judgment—Appeal—Error of counsel.*—A judgment cannot be reversed because an attorney in reading the word, "defendant" in the minutes, mistakenly understood it to be intended for "plaintiff."—McGregor v. Leighton, 598.

See Ejectment, 4, 5, 6; Mechanic's Liens; Sheriff's Sales, 1.

JURISDICTION.

1. *Courts, co-ordinate—Conflict of authority as to custody of property under attachment or execution.*—In case of a conflict of two co-ordinate courts, as to the jurisdiction over property, it is the universal rule, that the tribunal in which jurisdiction first attaches by the seizure and custody thereof under its process, must prevail.—Metzner v. Graham, 404.

See Attachment, 3; Judgment, 2, 3; Justices' Courts, 5, 6, 7; Mechanic's Lien, 1; Practice, civil, Trials, 3; Replevin, 1.

JURY.

1. *Jury—What facts influencing verdict may be shown.*—The rule is perfectly well settled, that jurymen cannot be allowed to disclose the fact of any partiality or misconduct which took place in the jury-room nor the motives which induced their verdict. But their affidavits showing that no disturbing influence was brought to bear upon them, and that they were not interfered or tampered with are properly received by the court.—State v. Underwood, 40.

2. *Practice, criminal—Separation of jury—Effect of.*—The separation of a jury in a criminal cause, will not vitiate the verdict, unless it further appear that they have been tampered with, or have been guilty of some improper conduct.—State v. Carlisle, 102.

See Condemnation of Land, 5; Ejectment, 1; Equity, 2; Fraud, 1; Practice, civil, Trials, 14.

JUSTICES' COURTS.

1. *Justices' courts—Formal judgment unnecessary in.*—In trials in justices' courts a verdict will be held as a judgment, and the entry of a formal judgment is not required.—Stemmons v. Carey, 222.

2. *Justices' courts, appeal from—Payment of costs not a pre-requisite—Constr. Stat.*—Payment of costs is not a pre-requisite to the right of appeal from a justice's court, where motion to set aside a default has been filed and overruled. The filing and overruling of such motion is the only *sine que non* to that right. (See 2 Wagn. Stat., 846-7, §§ 1, 2; also Beers vs. Atl. & Pac. R. R., 55 Mo., 292.) The statute of 1855 (R. C., 1855, 933, § 17; see also Wagn. Stat., 832, § 17) in no manner abridges the right of appeal. The intent of that law was merely to prevent a justice from prescribing any other conditions than payment of costs, for setting aside a default.—Palmer v. Kas. City, St. Joe & C. B. R., 250.

3. *Justice of Peace—Suit on lease made by partnership—Statement, what sufficient—Title of cause.*—A written lease from one firm to another, although executed in their partnership names, is a sufficient statement of the cause of action within the intent of the statute, in suit by the lessors against the lessees, before a justice of the peace. In such suit, the cause being entitled of the firm names is error, but not such as to work dismissal. The title might be amended at any time before final judgment in the Circuit Court. (See Wagn. Stat., 849, § 13.)—Moore & Co. v. Read Bros., 292.

4. *Limitations—Judgments before justices of peace in foreign States—Constr. Stat.*—Suits brought in this State upon judgments rendered in another State in justice's court, after the lapse of five years from the date of rendition, are barred by the statute of limitations. (Wagn. Stat., 917, 918, §§ 8, 9, 10 construed.) Humphreys vs. Lundy, (37 Mo., 320) and Sublett vs. Nelson, (38 Mo. 487), were cases of *scire facias* or proceedings analogous thereto, and were merely the continuation of proceedings already begun. They were not original and independent actions to which the statute can be pleaded.—Coomes, et al. v. Moore, 338

JUSTICES' COURTS, continued.

5. *Trespass—Common law and statutory trespass, united in one suit—Jurisdiction of justice, extent of—Power of court to treble damages.*—Where plaintiff's causes of action comprehend a common law trespass, for wrongfully entering his land, and also a trespass under the statute for cutting down and carrying away his timber; and the verdict is general concerning both trespasses, the damages cannot be trebled.

In such proceeding a justice would, under the statute concerning justices' courts (Wagn. Stat., 808–9, § 3), have jurisdiction to hear a case for single damages. to the extent of fifty dollars; and under the trespass act (Wagn. Stat., 1345, § 1), suit being for statutory trespass only, the court may treble the verdict.—Shrewsbury v. Bawtlitz, 414.

6. *Justices of peace—Jurisdiction in trover.*—A justice of the peace has no jurisdiction for *trover* and *conversion* of an amount exceeding fifty dollars. (Wagn. Stat., 808, § 3.)—Spencer v. Vance, 427.

7. *Justices' Court—Jurisdiction—Execution—Exemption.*— A justice of the peace has no jurisdiction in a trial upon interrogatories and answers between the plaintiff in execution and a garnishee, to determine the rights of the defendant upon his claim to select and hold the garnished debt as exempt from execution.—State to use v. Barada, 562.

8. *Justices' courts—Appeal—Notice—Appearance.*—Where an appeal is taken from a justice of the peace on a day subsequent to that of the judgment, the appellant will not be excused for failure to notify the appellee by reason of irregular entries made by the clerk at the return term of the Circuit Court, when no appearance is entered by the appellee, and no record entry is made to that effect.—McGregor v. Leighton, 597.

See Mechanic's Lien, 1.

L.

LAND AND LAND TITLES.

1. *Register of lands—Official character of, how established.*—It is not necessary in order to establish the official character of the Register or Receiver of Lands of the State, that anything more be proven than that they acted in the offices which they assumed.—Wiekersham v. Woodbeck, 59.

2. *Land Titles—Register of Lands—Receipt by, passes what title.*—The receipt of the Register and Receiver for the purchase money of land, is evidence that the State has passed at least its equitable title, although no patent has issued. Id.

3. *Land and land titles—Exchange of lands—Deed of trust—Vendor's lien, etc.*—A. owned a tract of land in the county, and B., a house and lot in the city, incumbered by a debt for $1,000, secured by deed of trust. They agreed to exchange, and did exchange property with each other, upon the express condition and agreement that upon exchanging titles the incumbrance on the property of B. should be removed, and that such removal should be received in part payment of the property of A., B. having obtained the title from A. by means of such promise, to remove the incumbrance. *Held*, 1st. That the debt which was secured by the deed of trust on the house and lot, would constitute until removed, a vendor's lien on the tract of land conveyed to B., notwithstanding that the deed from B. to A. contained covenants of warranty, for breach of which an action at law might be maintained. 2nd. That such lien is treated as a constructive or implied trust, and therefore not within the statute of frauds.—Pratt v. Clark, 189.

4. *Land containing spring of water—Dedication of.*—The first part of a certain paper bound the proprietors of a tract of land adjoining the town of Liberty, to allow the citizens of that place "the free privilege of drinking water," out of a spring embraced in the tract. The latter part reserves the special site about the spring from sale, for the benefit of the citizens; but the proprietors were allowed to make any use of the spring which would not "prevent the citizens of said town from using it."

LAND AND LAND TITLES, continued.

Held, that the proper intent of the instrument was to dedicate the spring to the citizens of Liberty, not merely for drinking purposes, but for any other use provided its capacity was not diminished for drinking purposes.—Corbin v. Dale, 297.

5. *Land and land titles—Quarter section corners, how ascertained in exterior sections bounded by township or range line—Regulations of U. S. Land Department—Rule as to interior sections, etc.*—Where the original monuments fixed by the United States for the corners bounding a tract of land can be found and identified, they are conclusive, and will govern without regard to courses and distances. But the regulations of the United States Land Department require that in exterior sections bounded on the north or west by range or township lines, where the quarter section corners cannot be found, the interior corner of the section shall be first found and established; from which exactly forty chains shall be measured along the line in the direction of the township or range line, and at that point the quarter section corner is to be placed; and this always leaves the excess or deficiency to the quarter directly on the township or range line. And it makes no difference whether the fraction contains more or less than the number of acres shown by the government field notes. And where the statute of this State conflicts with the regulations of the U. S. Land Department on this subject, the latter must govern.

In interior sections, where the original quarter section corners cannot be found or proved, they are to be established at a point equi-distant from the corresponding corners of the section.—Knight v. Elliott, 317.

6. *Will—Intention of testator must govern—Description of lands—What sufficient to pass title.*—In ejectment for certain land claimed under a will, it appeared that the instrument contained a schedule of the lands of the testator, some of which he described particularly, and others only as so many tracts in the State or a certain part of the State, without giving a description of the separate tracts; and an estimated value was placed upon the different lists. Among others was the following: "16 quarter sections of military bounty lands situated on the north side of the Missouri river, bought of Thomas Hawley." The will bequeathed to plaintiff's grantor "$3,000 worth of land to be valued by him according to the valuation contained in the list." The will further declared it to be the intention of the testator to dispose of all of his property. The executors, acting in supposed pursuance of the foregoing bequest, deeded to plaintiff's grantor the tract of land in controversy, which was shown to be the land of the testator and military bounty land, lying north of the Missouri, and in every way answered to the bounty land designated, except that it was conveyed to the testator by one Tower, and not by Hawley. *Held*, that the will should be so construed as, if possible, to effectuate the intention of the testator, and that the words, "bought of Thomas Hawley," should not be construed to restrict the other portions of the will, in which he declared his intention to bequeath his whole estate; and that as the land derived from Tower would otherwise remain undisposed of, although not particularly designated in the lists it would pass under operation of the will.—Gianes et al. v. Fender, 342.

7. *Sale of land after satisfaction of judgment.*—It is well established that if a judgment be satisfied, the power to sell under it ceases, and in case of sale, the purchaser gets no title. (Durette v. Briggs, 47 Mo., 356.)—Durfee v. Moran, 374.

8. *Land, sales of—Inadequacy of consideration—Equity will interfere, when.*—Although inadequacy of consideration is not of itself a distinct and independent principle of relief in equity, yet when the transaction discloses a state of affairs that shocks the moral sense or outrages the conscience, courts will interfere on slight grounds.—Id.

9. *Land sales—Combination to prevent bidding—Effect of.*—It is now the uniform doctrine that any combination, at public or private sales, having the effect of preventing competition in bidding, is against the policy of the law and avoids the sale.—Id.

LAND AND LAND TITLES, continued.

10. *Land and land titles—Claim founded on false field notes—Statute of limitations.*—Where one holds land up to a certain boundary as the true one, with the understanding however that he claims only to the extent of his paper title, the statute of limitations does not run in his favor, but where he claims absolutely and holds adversely to all others, although his claim proves to have been based upon a mistake touching the survey, the contrary rule prevails.—Major's Heirs v. Rice, 384.

11. *Land and land titles—Undisturbed possession—Estoppel.*—Where two adjoining proprietors recognize a certain dividing line as the true one, and with this understanding one of them with the knowledge and cognizance of the others erects dwellings and improvements up to this boundary, and is permitted for many years to maintain his possession, the adjacent owner will be estopped from afterwards disturbing his title.—Ib.

12. *Ancient deed—Execution—Proof as to—What sufficient.*—Where a deed was more than thirty years old and had been all the time in the possession of the grantee as a muniment of title; and no one had been in actual occupancy of the land, but the grantee had paid the taxes, and claimed the land under the deed, and the instrument seemed genuine, and the hand-writing of the attesting witness was proved; *Held*, that its execution as an ancient deed was sufficiently established.—Shaw v. Pershing, 416.

8. *Evidence—Loss of deed—Proof of—Secondary evidence, etc.*—Where a deed was attached to certain depositions, and the package duly enveloped sealed, directed and stamped, and placed in the mail, but failed to reach its destination, and was never heard of afterwards: *Held*, that the loss was sufficiently established to let in secondary evidence touching the conteets of the deed.—Id.

14. *Military bounty lands—Deeds, loss of—Presumption of, how raised—Copy of record over thirty years old—Admissibility of—Law touching, changed pending appeal—Constr. Stat.*—The loss of deeds executed outside of this State, affecting military bounty lands in Missouri will be presumed, so that secondary evidence of their contents may be admitted, if it appear that search has been made in the proper places and by the proper persons, and that they cannot be found after due diligence has been used in looking for them. Although it might be questionable whether a certified copy of the record—made more than thirty years before—of such a deed was admissible without proof of the execution of the original, under the law in force at the date of the trial below, (see Wagn. Stat., 595, §§ 35, 36,) yet being competent under the act of March 22d, 1873, the cause will not be sent back by the Supreme Court, on account of the error in admitting the copy. (See Totten vs. James, 55 Mo., 494.)—Hubbard v. Gilpin, 441.

15. *Tax deeds—Recitals as to advertisement of sale.*—Where a collector's deed merely recites that the advertisement for sale was made "according to law," the deed is void.—Id.

16. *Tax deed—Assessment in name of one having no record or apparent ownership.—Semble*, that an assessment of land under the law of 1855, (R. C. 1855, p. 1330, § 21,) in the name of the original patentee, who was not on the records the real owner, nor in point of fact the apparent owner, was a void assessment, and would invalidate a tax sale made under it.—Id.

17. *Ejectment—Labeaume survey and patent of* 1852 *prevailed over Lirette confirmation and survey of* 1826*—Brazeau reservation—Maguire vs. Tyler, referred to.*—In ejectment for certain land in St. Louis, plaintiff's claim was based originally on a confirmation made in 1810 to Labeaume, "according to the Soulard survey in 1799." The first survey of the tract did not include the land in dispute. But it was set aside and a new survey made retracing the Soulard survey, which embraced that tract, and on this new survey, a patent was issued to Labeaume in 1852. Defendant claimed, by virtue of a confirmation to Lirette of "one by forty arpents" made in 1816 by act of Congress, under which the land in controversy was located by a United States survey in 1826.

LAND AND LAND TITLES, continued.

Held, that the Labeaume confirmation being of a definite tract of land, took immediate effect, and that the subsequent proceedings by survey and patent related back to the proceedings before the board in 1870 and prevailed against the confirmation to Lirette. The case of Magwire vs. Tyler originated in a dispute about locality, and in that case the titles of Brazeau & Labeaume were synchoronous, and originated before the same board, and the survey locating the Brazeau tract within the Labeaume confirmation, was in that case, held correct, but that decision did not determine the last Labeame survey and patent issued thereon in 1852, to be invalid, except as to the Brazeau reservation. —Tyler v. Wells, 472.

18. *Conveyances—Execution—Acknowledgment—Delivery—Presumption*—A deed is not generally executed until it is acknowledged, and till that takes place there is no presumption of delivery.—Fontaine v. Boatmen's Savings Inst., 552.

19. *Deeds—Consideration clause—Recital may be contradicted.*—The consideration clause in a deed has only the character and force of a receipt, and is always open to explanation or contradiction.—Id.

20. *Public highway—Title to land.*—The owner of land joining on a public highway, street or alley, owns the fee to the center thereof, subject to an easement in the public.—Hannibal Bridge Co. v. Schaubanher, 582.

See Administration 1; Condemnation of land; Ejectment; Homestead; Lease; Limitation, 1, 2, 3; Trusts and Trustees, 1.

LANDLORD AND TENANT.

1. *Landlord and tenant act—Proceeding under—Petition may be amended, how.*—In a suit by attachment under the landlord and tenant act, plaintiff cannot, by amendment, change his cause of action so as to maintain the attachment against a plea in abatement. But if defendant appears to the action and files an answer in bar to the merits, the petition may be amended in the same manner and for like reasons as in other actions.—Fordyce v. Hathorn, 120.

2. *Landlord and tenant—Rent in kind—Place of payment.*—Where rent is payable in kind and no place of payment is stipulated, a tender upon the premises is sufficient. And the tenant holds the property so set apart as bailee at the risk and expense of the landlord.—Id.

3. *Justice of Peace—Suit on lease made by partnership—Statement, what sufficient—Title of cause.*—A written lease from one firm to another, although executed in their partnership names, is a sufficient statement of the cause of action within the intent of the statute in suit by the lessors against the lessees, before a justice of the peace. In such suits, the cause being entitled of the firm names is error, but not such as to work dismissal. The title might be amended at any time before final judgment in the Circuit Court. (Wagn. Stat., 849, § 13.)—Rohrbough, Moore, & Co. v. Reed Bros., 292.

LEASE.

1. *Lease—Subscribing witness—Proof of handwriting, etc.*—In suit by the maker against the other party to a lease, proof of the handwriting of a subscribing witness, then dead, and of the identity of the defendant with the person named in the instrument, is sufficient to render the deed admissible in evidence.—Gallagher v. Delargy, 29.

See Landlord and Tenant, 3.

LIEN, MECHANICS'; See Mechanic's Lien.

LIENS, VENDORS'; See Vendor's Lien.

LICENSE.

1. *License, revocation of—Power coupled with an interest, etc.*—A license is an authority or power, and marked with the incidents that usually accompany powers among which is the right of revocation at any time, at the will or pleasure of the person creating the power or granting the license. But this doctrine ceases to apply when the power is coupled with an interest, or is necessary to the possession or enjoyment of a right or title arising from the act or contract of the person who creates the power.—Baker v. C., R. I. & Pac. R. R. Co., 265.

LIMITATION.

1. *Limitations, statute of—Land vested in the State.*—Land vested in the State of Missouri while the act of 1857, (Sess. Acts 1856-7, p. 78, § 9,) was in force was subject to the bar of the statute of limitations.—Wickersham v. Woodbeck, 59.

2. *Limitations, statute of—Land vested in the State.*—Land vested in the State of Missouri while the act of 1857 (Sess. Acts, 1856-7, p. 78, § 9) was in force, was subject to the bar of the statute of limitations; and in an action by one holding under the State to recover such land, it might be pleaded, although suit was brought subsequent to the act of 1865. (Gen. Stat., 1865, p. 746, § 7.) Burch v. Winston, 62.

3. *Limitations—Statute of, in suit for title to land.*—In order to divest the title to land out of one owner and vest it in another, by reason of his adverse possession, that possession must be actual, visible, notorious and hostile, continuous and uninterrupted, under a claim of title, for a period of ten years next preceding the commencement of the suit.—Dalby v. Snuffer, 294.

4. *Limitations—Judgment before justices of peace in foreign States—Constr. Stat.*—Suits brought in this State upon judgments rendered in another State in justice's court, after the lapse of five years from the date of rendition, are barred by the statute of limitations. (Wagn. Stat., 917, 918, §§ 8, 9, 10 construed. Hmphreys vs. Lundy, (37 Mo., 320) and Sublette vs. Nelson, (38 Mo., 487,) were cases of *scire facias* or proceedings analogous thereto, and were merely the continuation of proceedings already begun. They were not original and independent actions to which the statute can be pleaded.—Coomes v. Moore, 338.

5. *Administrator's estate—General and special statutes of limitation.*—In the absence of any notice of the grant of letters of administration, the general statute of limitation applies, and begins to run in favor of the estate from the date of the letters.

Where notice of the grant of letters has been given, the special statute of three years takes effect, and the failure of such notice does away with that special bar, but not with the general limitation law.—Ayers, admr. v. Donnell, exr., 396.

6. *Non-suit—Action brought after in U. S. Court—Statute of limitations*—The statute requiring suit to be brought within one year after non-suits, etc., (Wagn. Stat., 919, § 19) does not prevent plaintiff, where otherwise entitled to his remedy in that tribunal, from bringing his action in the U. S. Court, and thus escaping the bar of the statute.

And such a non-suit may be voluntary, and need not be one brought about by an adverse ruling of court.—Shaw v. Pershing, 416.

See Administration, 6; Land and Land Titles, 10, 11.

LIS PENDENS; See Practice, civil, 5.

LOST DEED; See Evidence, 9; Land and Land Titles, 14.

M.

MALICE; See Criminal Law, 1.

MANDAMUS; See Railroads, 1.

MECHANIC'S LIEN.

1. *Mechanics' liens—Jurisdiction of circuit and justices' courts as to amounts.*—Under the constitution (Art. VI, § 13) and the statutes (Wagn. Stat., p. 430, § 2) the Circuit Courts of this state have no jurisdiction to try a mechanic's lien suit, where the amount involved is less than fifty dollars.

Under the act of 1872 (Adj. Sess. Acts 1872, p. 44), justices of the peace have jurisdiction over such cases; and jurisdiction is not taken from them or conferred upon the Circuit Courts by reason of the fact that justices' courts have no process by which non-resident defendants in such proceedings can be reached.—Stamps v. Bridwell, 22.

MECHANIC'S LIEN, continued.

2. *Mechanic's lien—Account—Items of—Time of filing.*—If the several items of an account form parts of one contract, and the last accrues within the statutory limit before the time of filing the lien, it will attach as to all.—Schmeiding v. Ewing, , 78.

3. *Mechanic's lien—No personal judgment against the owner of the building.*—In a suit to enforce a mechanic's lien, no personal judgment can be obtained against the owner of the building, who was not a party to the contract for the work or materials.—Id.

4 *Mechanic's lien—Time of filing—Clerical error may be corrected, when.*—Although the indorsement made by the clerk upon the written account required by the statute to perfect a mechanic's lien, will be *prima facie* evidence as to the date of filing, it will be nevertheless competent to show that he erred in this respect; and if the fact clearly appear, it is within the province of the court before whom the suit is tried to make the correction.—Grubbs, et al. v. Cones, et al., 83.

5. *Mechanic's lien—Admissions by builder touching account of material man no evidence against the owner, etc.*—The admissions by a builder acknowledging the correctness of an account rendered for material furnished in building a house, are evidence in a suit thereon against the builder, but not in a suit brought against the owner of the building under the mechanic's lien law.—Philibert v. Schmidt, 211.

6. *Practice, civil—Trials—Instructions—Mechanic's Lien.*—An instruction in a suit on a mechanic's lien, that "if they find the account as stated in the petition or any part of it due plaintiff, then plaintiff has a lien on said building and lot, for the amount found due," is erroneous because it ignores the question whether the plaintiff has taken the steps necessary to secure his lien.—Hall v. Johnson, 521.

MISTAKE; See Fraud, 2.

MORTGAGES AND DEEDS OF TRUST.

1. *Mortgages and deeds of trust—Chattel mortgages—Mortgagee entitled to possession after breach—Extension of time on debt.*—The mortgagee of personal property is entitled to possession of the mortgaged property after breach of condition, and an extension of time on the debt would make no difference with this right.—Bowens v. Benson, 26.

2. *Deed of trust—Sale under—Proceeds—Payment of taxes.*—A trustee holding the naked legal title to land, cannot, on a sale of the property, use part of the purchase money to satisfy taxes, or prior incumbrances, unless he is empowered thereto in the instrument creating the trust. In all such cases the purchaser takes the land subject to the incumbrances. *A fortiori* taxes cannot be so satisfied where they constitute a simple debt against the owner, and not a lien on the property.—Schmidt v. Smith, 135.

3. *Mortgage—Equity of redemption—Purchase of, by mortgagee.*—A. and B. jointly bought an equity of redemption in a tract of wild land, upon which. A. had a mortgage or a deed of trust. Subsequently A. foreclosed his mortgage and requested B. to join him in the sale under the trust, but B. refused. A. bought at a price greatly below the sum secured to him by the deed of trust. Years after A. died, his administrator sold the land to a stranger who put improvements on it worth $5,000. B. died also, and his heirs or representatives asked to be considered as tenants in common with these purchasers, on payment of one-half of A.'s bid, not one-half of his debt; *held*, that there was no equity in the bill, without an offer to pay one-half of A.'s debt; *held* further that the refusal of B. to join in the purchase at the trustee's sale—the death of B. and of A.—the sale by A.'s administrator—the purchase by a stranger, and a large investment of money in improvements, would be strong, if not conclusive evidence of an abandonment of the co-tenancy by B., and estop him and his heirs after a long lapse of time.—Potter v. Herring, 184.

MORTGAGES AND DEEDS OF TRUST, continued.

4. *Mortgages not under seal, when recorded impart notice.*—Under a proper construction of the several sections of the statute touching conveyances, (Wagn. Stat., p. 273, § 7; p. 277, §§ 24, 25, 26,) the registration of a mortgage, although having no seal or scrawl attached, nevertheless imparts notice. The registration law was intended to embrace not only legal conveyances, but all instruments in writing affecting real estate in law or equity.—McClurg v. Phillips, 214.

5. *Equity—Sale under deed of trust—Parol statements of purchaser, as to intention in purchasing—Resulting trust.*—Where the beneficiary in a deed of trust was apparently a *bona fide* purchaser, at the sale by the trustee, of an absolute title to real estate, the fact that the maker of the deed was a brother-in-law, and the fact that the purchaser casually said to him afterward, that he only wished by the purchase to secure his debt, and when that was paid designed to re-convey the property, were held not to be such circumstances as of themselves to render him a trustee for the maker of the deed. Such a remark was no declaration of trust, which a Court of Equity could enforce had it been reduced to writing. And being parol it was a nullity under the statute of frauds. Nor would such declaration vest such equitable interest in the grantor as to subject it to his creditors.—Mansur v. Willard, 347.

6. *Mortgage, chattel—Sale of mortgaged stock by mortgagor, etc.—Statute of Frauds.*—Where a mortgagor of chattels, by the terms of the instrument is not permitted to sell or dispose of them for his own use, but is required to apply the proceeds to the discharge of the debt secured by the mortgage, the deed is not void as being for the use of the mortgagor. (Brooks vs. Wimer, 20 Mo., 503; Stanley vs. Bunce, 27 Mo., 269; Billingsley vs. Bunce, 28 Mo., 547, referred to).—Metzner v. Graham, 404.

7. *Chattel mortgage—Possession before condition broken.*—The law is well settled that although a trustee or mortgagee of personal property is, after default made or condition broken, entitled to its possession, and considered in law as its owner, yet prior to that time it is equally certain that no such right of either possession or ownership exists.—Barnett v. Timberlake, 499.

See Land and Land Titles, 3; Conveyance, 2.

MURDER; See Criminal Law, 1, 2, 3.

N.

NEGLIGENCE; see Agency, 1, 2; Fraudulent Misrepresentations.

NEW TRIAL; see Practice, civil—New Trial.

NON-SUIT; see Limitation, 5; Practice, civil—Appeal, 3.

NOTARY PUBLIC.

1. *Notary Public—Certificate—Failure to mention seal—Copy of certificate, etc.*—A notary's certificate is not rendered invalid by reason of the mere fact that it purports to be executed under his "hand and official signature," and that his notarial seal is not mentioned therein, where the seal is attached to the certificate. And in such case, a copy taken from the recorder need not have the impress of the original seal; that may be indicated by a scrawl.—Dale, et al. v. Wright, 110.

NOTICE; see Administration, 6; Attachment, 1, 2, 3; Court, County, 2; Innkeeper, 1; Judgment, 2, 3; Justices' Courts, 8; Mortgages and Deeds of Trust, 5; Practice, civil, 5; Publication; Sheriff's Sales, 3; Venue, 2.

O.

OFFICERS; see Constable; Corporation, 3; Corporations, Municipal, 2; Court, County, 1; Register of Lands; Sheriff.

P.

PARTNERSHIP.

1. *Partnership, what essential thereto.*—To constitute a partnership, there must be an agreement between the parties that they will, from a certain day or time share the profits and be responsible for the losses, and carry on the business for their common benefit; and there must be an entering upon or conducting or doing business under such agreement, or some business preparatory thereto, to make them or either of them liable to third parties as partners.—Lucas v. Cole, 143.

2. *Justice of peace—Suit on lease made by partnership—Statement, what sufficient—Title of cause.*—A written lease from one firm to another, although executed in their partnership names, is a sufficient statement of the cause of action within the intent of the statute, in suit by the lessors against the lessees, before a justice of the peace. In such suit, the cause being entitled of the firm names is error, but not such as to work dismissal. The title might be amended at any time before final judgment in the Circuit Court. (See Wagn. Stat., 849, § 13.)—Rohrbourg, Moore & Co. v. Reed Bros., 292.

3. *Partnership—Note given outgoing partner for assets—Suit on in action at law, when proper.*—Where one of two co-partners buys the notes and accounts of the firm at their face value, and gives the co-partner his note for the amount with the understanding that where the notes and accounts prove worthless, a rebate *pro tanto* should be made on the purchase note, *held*, that in suit on the note in an action at law, defendant might, where these assets prove valueless, set up the facts to that extent as a defense to the note. No resort would be necessary in the first instance to a bill in equity for the purpose of settling the partnership. (See Russell v. Grimes, 46 Mo., 410.)—Bethel v. Franklin, 466.

4. *Equity—Partnership—Fraud — Misrepresentations or concealment between partners—Pleading—Sufficiency—Relief—Vigilance.*—Where one member of a firm who had the entire management of the partnership, without the knowledge or consent of his co-partner used the money, assets and credit of the concern in outside speculations, and appropriated the benefits to himself individually, and subsequently rendered to his co-partner a false balance sheet, purporting to correctly exhibit the true condition of the firm affairs, but which in fact did not mention or allude to the outside operations, and assured his co-partner that this statement was correct, and on the faith of this statement and his representations his partner was induced to convey to him all his interest in the concern, and to execute a bill of sale therefor, which though not mentioning the profits of the said outside operations, was in form sufficiently broad to cover them, *Held:*

1st. That a petition setting forth the above facts and concluding with a prayer for a re-opening of the settlement and a prayer for general relief, stated a cause of action; and the prayer for general relief authorized any relief consistent with the facts alleged.

2nd. That it was no excuse or defense that the co-partner might have discovered the wrong, and prevented its accomplishment, had he exercised watchfulness. Lack of vigilance only serves as a defense where the party being apprised of, slumbers upon his rights.—Pomeroy v. Benton, 531.

5. *Partnership—Outside ventures by one partner, with partnership funds.*—Outside of any stipulations in the partnership articles, good faith should restrain one partner from embarking the funds or credit of the firm outside of their legitimate scope, and for his own advantage; and if such ventures are made by one partner, he cannot appropriate the profits to himself, but must account for them to the partnership.—Id.

6. *Partnership—Agency—Responsibility between partners.*—Every partner is the agent of his co-partner, and the same rules and tests are applied to the conduct of partners, as are ordinarily applicable to that of trustees.—Id.

PAUPER.

1. *Support of the poor—Funeral expenses—County not liable for.*—The legislature never intended, by § 6 of the act for the support of the poor, (Wagn. Stat., p. 997–8) that the county should pay the funeral expenses of a man who had sufficient means to bury him at the time of his death, notwithstanding the fact that the administration law might vest all his property in his widow.—Handlin v. Morgan Co., 114.

2. *Support of the poor—Burial Expenses.*—One who voluntarily buries a poor person, has no legal demand against the county therefor.—Id.

PERJURY.

1. *Perjury—Evidence, what necessary in addition to accusing witness.*—To convict of perjury the oath of the opposing witness must be corroborated by material and independent testimony. And an instruction, ignoring this point, and directing a conviction in case the jury are satisfied, etc., of guilt, is manifest error; but it is also error to instruct that such additional evidence must be tantamount to another witness.—State v. Head, 252.

PHELPS COUNTY; see County Courts, 1.

POSSESSION; see Ejectment, 4, 5, 6; Land and Land Titles, 11; Mortgages and Deeds of Trust, 1, 9.

POWERS.

1. *License, revocation of—Power coupled with an interest, etc.*—A license is an authority or power, and marked with the incidents that usually accompany powers, among which is the right of revocation at any time, at the will or pleasure of the person creating the power or granting the license. But this rule ceases to apply when the power is coupled with an interest, or is necessary to the possession or enjoyment of a right or title arising from the act or contract of the person who creates the power.—Baker v. C. R. I. & P. R. R., 265.

2. *Powers, limitations upon.*—Limitations upon powers to be exercised by corporations and by individuals, are to be interpreted alike in both cases by the terms in which they are expressed, and without reference to whether the powers be inherent or conferred.—Farmer's and Trader's Bank v. Harrison, 503.

PRACTICE, CIVIL.

1. *Scire facias—Suit must be revived when—Construction of statute.*—The true intent and meaning of § 6 of the act touching the abatement and revival of suit, is that the suit must be revived at or before the third term, after the term at which the suggestion of death is made. In making the computation the term at which the death is suggested, must be excluded.—Gallagher v. Delargy, 29.

2. *Practice, civil—Jurisdiction waived, how.*—An appearance to the merits and the setting up of a defense in bar to the action, waives a plea to the jurisdiction.—Rippstein v. St. Louis Mut. Life Ins. Co., 86.

3. *Practice, civil—Insufficient pleading—Motion in arrest, etc.*—Where enough can be gleaned from a petition to show that plaintiff has a cause of action, a motion in arrest, on the score of insufficient statement, will be overruled.—Corpenny v. City of Sedalia, 88.

4. *Practice, civil—Constructive service, not shown to be made at usual place of abode gives no jurisdiction.*—Where the sheriff's return shows that a copy of the petition and writ were left with defendant's wife, but fails to show that it was left at his usual place of abode, such service confers no jurisdiction on the court, and judgment and sheriff's sale and deed of land based thereon are absolutely void in ejectment suit by a purchaser at execution sale.

Where personal judgment is sought to be rendered on constructive service, the essentials of the statute ought to be substantially complied with.—Hewitt v. Weatherby, 276.

5. *Lis pendens applies only to those having notice, etc.*—The doctrine of *lis pendens* only applies when parties to a suit have been notified of it. There is no *lis pendens* as to strangers until process is served or there is a voluntary appearance of the parties to it.—Bailey v. McGinness, 362.

See Venue.

PRACTICE, CIVIL—ACTION.

1. *Scire facias—Suit must be revived when—Construction of statute.*—The true intent and meaning of § 6 of the act touching the abatement and revival of suits, is that the suit must be revived at or before the third term after the term at which the suggestion of death is made. In making the computation the term at which the death is suggested must be excluded.—Gallagher v. Delargy, 29.
2. *Life Insurance, suit against—Corporations—Cause of action accrues, where—Where suit may be begun.*—Under the statute authorizing suits to be brought against a corporation in the county "where the cause of action accrued." (Wagn. Stat., 294, § 28.) the cause of action against a Life Insurance Company accrues at the place of death, and suit may be commenced there notwithstanding that the contract of insurance may have been entered into in another county.—Rippstein, v. St. L. Mut. Life Ins. Co., 86.
3. *Life Insurance Company, suit against—Formal proofs waived, how.*—In a suit on a life insurance policy, a defense charging death by *delirium tremens*, which allegation, if true, exempted the company from all liability, amounted to a waiver of the formal proofs required by the by-laws of the company.—Id.
4. *Actions—Trover of stock sent South during the war.*—In suit for the value of certain stock, where it appeared that plaintiff had sent the same from Missouri into Texas after the President's proclamation of non-intercourse of August 16th, 1861, and that defendant had there converted it to his own use; *held*, that these facts would not bar plaintiff's right of recovery. The plaintiff's act in sending the stock through the lines authorized its appropriation by the general government but not by a private citizen.—Charles v. McCune, 166.
5. *Evidence—Contents of lost record—Nature of action to prove.*—The general rule is, that if a record is lost or destroyed, its contents may be proved like those of any other instrument. And the party may proceed by his common law action, without resorting to the statutory remedy.—Parry v. Walser, Adm'r, 169.
6. *Practice, civil—Ejectment—Special verdict.*—A suit in ejectment for a certain tract of land without claim for further relief is not one wherein special issues of fact may be submitted to the jury. (Wagn. Stat., 1040-1, §§ 11, 12, 13; 1042, §§ 20, 22.)—Majors' Heirs v. Rice, 384.

See Damages, 2; Ejectment; Equity; Landlord and Tenant; Mandamus; Replevin; Trespass; Trover; Vendor's Lien, 1.

PRACTICE, CIVIL—APPEAL.

1. *Judgment for costs not final.*—A judgment for costs is not a final judgment from which an appeal will lie. (Boggess v. Cox, 48 Mo., 278.)—Dale v. Wright, 110.
2. *Justices' courts, appeal from—Payment of costs not a pre-requisite—Constr. Stat.*—Payment of costs is not a pre-requisite to the right of appeal from a justices' court, where motion to set aside a default has been filed and overruled. The filing and overruling of such motion is the only *sine qua non* to that right. (2 Wagn. Stat., 846-7, §§ 1, 2; also Beers vs. Atl. & Pac. R. R., 55 Mo., 292.) The statute of 1855 (R. C., 1855, 953, § 17; see also Wagn. Stat., 832, § 17) in no manner abridges the right of appeal. The intent of that law was merely to prevent a justice from prescribing any other condition than payment of costs, for setting aside a default.—Palmer v. Kas. C., St. Jo. & Council Bluffs R. R. Co., 249.
3. *Res adjudicata, judgment must be on merits.*—A former judgment to operate as *res adjudicata*, must be a judgment on the merits.—Verhein v. Schultz, 326.
4. *Non-suit, voluntary—Appeal will not lie.*—Appeal will not lie to set aside a voluntary non-suit.—Koger v. Hays, adm'r, 329.

See Justices' Courts, 8; Practice, Supreme Court, 2; Railroads, 4.

PRACTICE, CIVIL—NEW TRIAL.

1. *Practice, civil—Motion for new trial—Points not embraced in, disregarded in Supreme Court.*—Points not embodied in a motion for a new trial will be disregarded in the Supreme Court.—Acock v. Acock, 154.

PRACTEIC, CIVIL—PARTIES.

1. *Practice, civil—Suit brought by husband to use of wife—Error, how corrected.* The supreme court will not reverse a cause simply on the ground that the suit was brought in the name of the husband to the use of his wife instead of in the name of the husband alone; such error may be corrected by the trial court after judgment, or by the supreme Court, (see Wagn. Stat. 1034, § 6, and 1037, § 20).—Cruchon v. Brown, 38.

See Damages, 2.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil—Insufficient pleading—Motion in arrest, etc.*—Where enough can be gleaned from a petition to show that plaintiff has a cause of action, a motion in arrest on the score of insufficient statement, will be overruled.—Corpenny v. City of Sedalia, 88.

2. *Practice, civil—Defenses in abatement waived, when.*—Where matters in abatement and bar are contained in the same answer, the matters in abatement are waived by setting up the defenses in bar.—Fordyce v. Hathorn, 120.

3. *Landlord and tenant act—Proceeding under—Petition may be amended, how.*—In a suit by attachment under the landlord and tenant act, plaintiff cannot, by amendment, change his cause of action so as to maintain the attachment against a plea in abatement. But if defendant appears to the action and files an answer in bar to the merits, the petition may be amended in the same manner and for like reasons as in other actions.—Id.

4. *Practice civil—Pleadings—Variance.*—In suit by the "International Insurance Company, of New York," on the bond given to the company by one of its agents, the recital in the bond, of plaintiff's name, as the "International Insurance Company of the City and State of New York," was held an immaterial variance.—International Ins. Co. v. Davenport, 289.

5. *Fire insurance—Waiver of notice of loss by company—Averment as to, unnecessary.*—In suit against an insurance company for loss by fire, proof as to waiver of notice of loss, may be made without any special averment of that fact in the pleading.—Schultz v. M. Ins. Co., 331.

6. *Fire insurance—Suit on policy of—What allegations sufficient.*—In suit on a fire insurance policy, the petition need not specifically allege notice and proof of loss. A simple averment that plaintiff "duly fulfilled all the conditions of said policy on his part," is sufficient. (Wagn. Stat., p. 1020, § 42.)—Richardson v. N. M. Ins. Co., 413.

7. *Practice, civil—Pleading—Evidence—Note—Denial of execution—Fraud may be shown.*—Under a plea denying the execution of a note, defendant may prove that his signature was procured by fraud.

Generally where an instrument is void *ab initio* and not merely voidable, the plea of *non est factum* is proper. And evidence which shows the paper to be void is admissible under that plea.—Corby Ex'r v. Weddle, 452.

8. *Practice, civil—Pleading—Petition—Sufficiency of allegations of—Objections, when must be taken.*—Under our code (2 Wagn. Stat., 1012, § 1; 1015, § 10), if a petition, however inartificially drawn, do but state a cause of action and no objections are taken to the formal sufficiency of the allegations either by demurrer or answer, the defendant is deemed to have waived all such objections.—Pomeroy v. Benton, 531.

9. *Practice, civil—Pleading—Plaintiff's character as executor, sufficiency of allegations of.*—When in a petition plaintiffs styled themselves the executors of A., and stated that the note sued on was made to their testator, averred his death and brought into court and made profert of the letters of administration: *held*, that although there was no direct averment of plaintiffs' appointment as executors, yet that fact was necessarily inferrable from the other facts stated, and the petition was not so defective as to be demurrable on that account.—Bird, Exr. v. Cotton, 568.

10. *Demurrer sustained, effect of—Suit still pending.*—When a demurrer to a petition is sustained with leave given to amend, the suit is still pending until other and final action. Either party may take depositions without waiting for further pleading.—*Ex parte*, James E. Munford, 603.

PRACTICE, CIVIL—PLEADING, continued.

11. *Taking depositions—State of pleading.*—The taking of depositions, under the statute, has no necessary reference to the state of the pleadings at the time of the taking. It is a provision against contingencies, for the possible condition of the cause at the time of trial. It is not essential that the notary be acquainted with the issues, or that there be in fact any issues; provided, only, that the cause has been regularly instituted and is not finally disposed of.—Id..

See Ejectment, 5, 6; Justices' Courts, 3; Partnership, 4.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Allegata and probata—Variance, what not sufficient to invalidate verdict.*—In suit for the value of certain chattels where the petition charged a sale, whereas the evidence showed merely an agreement to return the same or corresponding articles, and a subsequent admission of indebtedness and promise to pay it; *held*, that such variance would not vitiate the verdict in the absence of proof that defendant was surprised or injured thereby. (See Wagn. Stat., 1033-4, §§ 1, 2.)—Wells v. Sharp, 56.

2. *Practice, civil—Variance—What remedy in case of.*—Where the variance between pleading and proof is material, the proper remedy is an affidavit filed with the trial court, setting forth the facts and an order directing an amendment upon terms.—Id.

3. *Practice, civil—Jurisdiction waived, how.*—An appearance to the merits and the setting up of a defense in bar to the action, waives a plea to the jurisdiction.—Rippstein v. St. L., M. L. Ins. Co., 86.

4. *Venue, change of—Application for—Proof not necessary, when.*—Where an application for change of venue is made after answer filed, on the ground that the cause for such change arose or became known to deponent after the filing, if the application complies with the statute, (Wagn. Stat., 1355-6, § 2) as to its recitals and verifications, it is sufficient to establish a *prima facie* right to the order. The applicant is not compelled to follow the statute literally, and establish by evidence *aliunde*, the facts sworn to.—Corpenny v. City of Sedalia, 88.

5. *Practice, civil—Instructions.*—Instructions which are not based upon facts in the case, and are not calculated to mislead, although correct as abstract propositions of law, should be refused.—State v. Bailey, 131.

6. *Practice, civil—Instructions.*—An instruction not based on evidence should be refused.—Musick v. A. & P. R. R. Co., 134.

7. *Practice, civil—Instructions—Commenting on testimony.*—An instruction commenting upon particular portions of testimony, to the exclusion of others, although correct *pro tanto*, is calculated to mislead the jury, and should be refused.—Jones v. Jones, 138.

8. *Practice, civil—Non-production of evidence caused by an intimation from the court.*—It is no sufficient reason for the non-introduction of testimony, that in the progress of the trial the court gave an intimation to the party in default that the ultimate decision might be in his favor.—Smith v. Funk, 239.

9. *Practice, civil—Instructions calculated to mislead, etc.*—An instruction having no application to the case and calculated to mislead the jury, should be refused.—Grigsby v. Fullerton, 309.

10. *Practice, civil—Evidence—Verdict.*—In a civil law case the supreme court will not interfere with the verdict of a jury on a question of conflicting testimony.—Schultz v. M. Ins. Co., 331.

11. *Practice, civil—Instructions in chancery suits.*—Where an answer sets up equitable defenses and the case is tried by the Court sitting as Chancellor, little regard will be paid by the Supreme Court to instructions.—Durfee v. Moran, 374.

12. *Practice, civil—Ejectment—Special verdict.*—A suit in ejectment for a certain tract of land without claim for further relief is not one wherein special issues of fact may be submitted to the jury. (Wagn. Stat., 1040-1, §§ 11, 12, 13; 1042, §§ 20, 22.)—Majors' Heirs v. Rice, 384.

PRACTICE, CIVIL—TRIALS, continued.

13. *Non-suit—Action brought after in U. S. court—Statute of limitations.*—The statute requiring suit to be brought within one year after non-suit, etc., (Wagn. Stat., 919, § 19) does not prevent plaintiff, where otherwise entitled to his remedy in that tribunal, from bringing his action in the United States court, and thus escaping the bar of the statute.

And such a non-suit may be voluntary, and need not be one brought about by an adverse ruling of court.—Shaw v. Pershing, 416.

14. *Practice, civil—Evidence—Juries.*—In civil cases at law juries are the sole judges of the preponderance of testimony.—Wannell v. Kem, 478.

15. *Practice, civil—Trials—Instructions—Mechanic's Lien.*—An instruction in a suit on a mechanics' lien, that "if they find the account as stated in the petition or any part of it due plaintiff, then plaintiff has a lien on said building and lot for the amount found due," is erroneous because it ignores the question whether the plaintiff has taken the steps necessary to secure its lien.—Hall v. Johnson, 521.

16. *Practice, civil—Witnesses, credibility of—Jury.*—The credibility of witnesses must be passed upon by the jury.—Durkee v. Chambers, 575.

17. *Practice, civil—Instruction assuming facts will not warrant reversal, when.*—An instruction which assumes as true, a fact in issue, is wrong; but where the evidence is clear and conclusive as to such fact, and there is no contradictory testimony, the giving of such instruction will not warrant a reversal of the cause.—Caldwell v. Stephens, 589.

See Ejectment, 1; Fraud, 1; Jury, 1.

PRACTICE, CRIMINAL; see Criminal Law.

1. *Practice, criminal—Change of venue.*—Notwithstanding the provisions of the statute, (Wagn. Stat., p. 1098. § 27,) a second change of venue may be granted in a criminal cause when the judge has been of counsel therein. (See State vs Gates, 20 Mo., 400.)—State v. Underwood, 40.

2. *Practice, criminal—Co-defendant, when may be first tried.*—Where facts and circumstances are shown which render it apparent that no verdict of "guilty" can be obtained against a co-defendant in a criminal prosecution, it is the practice to allow him to be first tried so that he may be a competent witness. Where the evidence against him is slight, the court may, in its discretion, submit his case at the close of the testimony for the prosecution.—Id.

3. *Practice, criminal—Presence of prisoner, when unnecessary.*—Every person indicted for a felony must be present during the trial, (Wagn. Stat. 1103, § 15); but the mere fact that a motion affecting his case is taken up and discussed in his absence, where no final action is had thereon, is not such error as will warrant a reversal.—Id.

4. *Practice, criminal—Indictment for robbery in first degree—Conviction of robbery in second degree—Autrefois acquit.*—A prisoner was indicted for robbery in the first degree, and under the indictment might have been convicted of grand larceny. Being convicted of robbery in the second degree, the verdict was without his consent set aside. *Held,* 1st, that a conviction of robbery in the second degree operated as an acquittal of the higher offense charged; 2nd, that the prisoner could not be retried under the same indictment, and found guilty of grand larceny. (See State v. Brannon, 55 Mo., 63.)—State v. Pitts, 85.

5. *Practice, criminal—Separation of jury—Effect of.*—The separation of a jury in a criminal cause, will not vitiate the verdict, unless it further appear that they have been tampered with, or have been guilty of some improper conduct.—State v. Carlisle, 102.

6. *Practice, criminal—Abuse of trust—Indictment—Allegation of scienter.*—An indictment against a County Court justice, under the act of 1872, (Adj. Sess. Acts, 1872, p. 59) for an abuse of public trust in voting for a certain appropriation, which charged that "well knowing that the appropriation and payment were illegal," etc., * * "he knowingly and feloniously did vote for said illegal appropriation," etc., is insufficient. The further averment would be necessary to the effect that he was actuated by some dishonest or corrupt motive. (See State vs. Hein, 50 Mo., 362.)—State v. Pinger, 243.

PRACTICE, CRIMINAL, continued.

7. *Practice, criminal—Instruction—Reasonable doubt, etc.*—It is error to instruct a jury to acquit in case of a "reasonable doubt," without adding an explanation of the phrase, such as *e. g.* that such doubt ought to be a substantial doubt touching the prisoner's guilt, and not a mere possibility of his innocence. (State vs. Nueslein, 25 Mo., 111.)—State v. Heed, 252.

See Criminal Law; Revenue, 3; Venue, 6.

PRACTICE, SUPREME COURT.

1. *Practice, civil—Supreme Court—Case reversed on question of fact, when.*—The Supreme Court will reverse on a question of fact, where such fact is material to plaintiff's right to recover, and is wholly without proof.—Schmeidling v. Ewing, 78.

2. *Practice, Supreme Court—Appeal from Caldwell Common Pleas, etc.*—Appeal does not lie directly to the Supreme Court from the Court of Common Pleas of Caldwell county. (Smith v. Guerant, 55 Mo., 584, affirmed.)—Wilson v. Reed, 238.

3. *Practice, Supreme Court—Care in bringing up record.*—Parties who bring cases to the Supreme Court should see to it that the record is so made up as to raise the points on which they rely.—Inhabitants of Brookfield v. Carter, 315.

4. *Practice, Supreme Court—Preponderance of testimony.*—In civil law cases the Supreme Court will not decide as to preponderance of testimony.—Kiley v. Forsee, 390.

5. *Practice, Supreme Court—Failure to assign error, etc.*—Where appellant fails to file assignment of errors, statement or brief, as required by law, the appeal will be dismissed.—Birch v. Hoyt, 412.

6. *Practice, civil—Failure to save exceptions, etc.*—In a civil law case where no exceptions are saved to any ruling of court, and no point of law is brought up by instructions, motion in arrest, or for new trial, or by bill of exceptions, the judgment of the court below will be affirmed.—Davis v. Ware, 460.

7. *Practice, Supreme Court—Absence of bill of exceptions.*—No bill of exceptions appearing in the record, the Supreme Court cannot review the action of the court below, upon motion and affidavits to set aside the judgment.—Clarkson v. Stanchfield, 573.

See Equity, 3; Fraud, 1; Practice, Civil—New Trials, 1; Practice, Civil—Trials, 10.

PRESUMPTION; See Attachment, 2; Evidence.

PUBLICATION; See Attachment, 1, 2, 3.

R.

RAILROADS.

1. *Railroads—County Courts—Subscription of stock—Mandamus to compel will not lie after completion of road, etc.*—Under the Act of March 23rd, 1868, (Adj. Sess. Acts 1868, p. 92) mandamus would not lie on behalf of a railroad company or tax-payers of a township to compel the County Court to subscribe stock to the railroad after the same had been fully completed through the township. The company could have no legal interest in the subscription until actually made and accepted by it; and so far as the county was concerned, the authority to make the subscription ceased as soon as the road was completed through the township. It was not contemplated by the above act, that townships should be allowed to take stock in roads already built.—State, v. Co. Ct., Bates Co., 70.

2. *Railroads—Timbered lands, fencing of.*—The statute concerning railroad corporations (Wagn. Stat., 310, § 43) contemplates, that the company shall fence in the line of its road adjoining all inclosed lands whether timbered or otherwise. (Slattery vs. St. L., K. C. & N. R. R. Co., 55 Mo., 362.)—Saunders v. St. L., K. C., and N. R. R., 117.

RAILROADS, continued.

3. Under Wagn. Stat., § 43, p. 310, a railroad company is not responsible for stock killed by the cars, etc., when such killing takes place at a point on their road where it is not fenced, and where it does not pass through or along inclosed or cultivated fields, or uninclosed prairie lands, unless actual negligence be proven—Musick v. A. & P. R. R., 134.

4. *Railroads—Atl. & Pac. R. R.—Taxation—Act of Dec. 25, 1852, a contract.*—The twelfth section of the act of Dec. 25th, 1852, and its acceptance by the Pacific Railroad, were a contract between the State and that company binding the state, and for two years after its completion exempted that road from taxation, no dividend being declared in the meantime; and the same principle governs as to taxation of what is denominated as the South West Branch Railroad. (See decision in Pacific R. R. Co.v. Maguire, Wall. U. S. Sup. Ct. R.) —South Pac. R. R. v. Laclede Co., 147.

5. *Railroads—Timbered lands—Inclosure of road along.*—Under the statute touching Railroad Companies, (Wagn. Stat., 310, § 43) they are bound to fence the line of their roads adjoining inclosed lands, although timbered.—Sparr v. St. L., K. C. & N. R. R., 152.

6. *Railroads—Action for damages in name of owner—Constr. Stat.*—Suit against a railroad company, to recover double damages for injuries to stock, need not be brought in the name of the State, under § 42 of the Railroad Act, (Wagn. Stat., 310) but may be instituted in the name of the owner, under § 43 p. 310–11.—Id.

7. *Railroad—Grant of right of way on conditions—Failure to comply with—Permission to occupy—License, revocation of—Estoppel—Ejectment.*—The owner of certain land consented to its occupation for the construction of a railroad, and executed a conveyance granting right of way over the same, conditioned that the company should, within a given time after its completion, place fences and cattle guards adjoining the grantor's land, as required by law. The deed was delivered to the agent of the company, with the understanding, however, that it was not to be delivered to the company till they complied with its terms. The corporation went forward without objection from the grantor, and completed the road, and made expensive and permanent improvements upon it, but failed to erect the fences and cattle guards. The deed was never delivered to the company, and the grantor brought suit in ejectment. *Held,* that the grantor might have insisted upon the payment of damages, as a condition precedent to building of the road, or upon the erection of fences, etc. in the first instance; but that the conditions named in the grant referred to were subseqnent and not precedent; that the entry under the license was lawful; and that, by reason of his conduct in allowing the company to build the road and make the improvements, he was estopped from afterward treating his permission as a nullity, and maintaining ejectment.

The remedies of the grantor in such cases are ample. He may sue for specific performance, or for damages, or build fences and cattle guards and compel the company to pay for them.—Baker v. Rock Island & Pac. R. R. Co., 265.

8. *Railroads—Inaction of owner of land not held as acquiescence, when.*—Mere silence and inaction, for the time being, on the part of a land owner, when informed that a railroad company are constructing their track over his property, will not be construed into acquiescence so as to estop him from his action of ejectment.—Walker v. Chicago, R. I. & Pac. R. R. Co. 275.

9. *Railroad company—Occupation of land without authority—Ejectment.*—Where a railroad company builds its road over land to which they have acquired no requisite title by condemnation, or conveyance or license, ejectment will lie—Ib.

10. *Railroads—Contractors—Teamsters, etc.—Construction of Statute.*—The statute making railroads amenable to laborers for work done under the employment of contractors (Wagn. Stat., 302, § 10), does not include persons who furnish wagons and drivers, to haul or deliver material in the construction of the road. (See on this subject Sess. Acts 1873, p. 61.)—Grooves v. K. C., St. Joe. & Council Bluffs R. R. Co., 304.

RAILROADS, continued.

11. *Railroads—Drainage of surface water—Must be accomplished with reasonable care, etc.*—While a railroad company has a right to drain surface water from its road bed, so as to protect the same for continued and profitable use, the work must be so done as to occasion no unnecessary inconvenience or damage to the adjoining proprietor. And the latter may recover for injuries produced by mere negligence without proving malicious intent.—McCormick v. St. Jos. & Council Bluffs R. R. Co., 433.

12. *Railroads—Damage to adjoining land—What contemplated by estimate of damages assessed in condemning.*—Damages to adjoining land such as would naturally occur where a railroad is constructed and used in a lawful and ordinary manner, are presumed to be included in the estimate of damages assessed in condemning the road bed, and cannot afterward be recovered in a suit against the railroad. But otherwise, where the injuries are the result of tort or negligence on the part of the company.—Id.

13. *Railroads—Fencing of field where highway intervenes.*—The spirit of the statute, (Wagn. Stat., 310-11, § 43) contemplates that railroad corporations shall fence the line of their road along an inclosed field, although a public highway abuts upon the road and intervenes between it and the field.—Robinson v. C. & A. R. R., 494.

14. *Damages—Railroads, suits against—Proceedings for condemnation—Appeal bond in.*—In an action of damages against a railroad company for appropriating plaintiff's land, it is no defense to the suit that defendant had commenced proceedings for condemnation of the property, and had appealed to the Supreme Court from the report of the commissioner. The appeal bond would not be held as an indemnity for plaintiff's damages.—Ring v. Miss. River Bridge Co., 496.

15. *Railroads—Condemnation—Failure of company to pay damages—Trespass—Road liable for action of, when.*—The owner of land taken for railroad purposes may demand payment of his damages as a condition precedent to the appropriation. But if he waives this right, and permits the company to proceed in the construction of its work, he may nevertheless have his action at any time against the road for the injury done to his property. Where the road fails to deposit with the clerk the amount assessed as damages, (Wagn. Stat., 327, § 3) but appeals from the report of the commissioners, any further interference with the property, till the question of damages is determined, would be trespass and render the company liable to an action therefor.—Id.

See Eminent Domain, 1; Revenue, 2.

RECORD; See Evidence, 5, 6; Land and Land Titles, 14; Mortgages and Deeds of Trust, 4; Practice, Supreme Court, 3.

REGISTER OF LANDS; See Land and Land Titles, 1, 2.

REPLEVIN.

1. *Replevin—Motion to dismiss.*—Where property was seized under a writ of replevin, issued from the Cape Girardeau Court of Common Pleas, and the Judge of the Circuit Court for that county had issued his warrant in vacation, directing the property to be delivered to defendant, and the property was so delivered in pursuance of such order; *Held*, that a motion to dismiss the action of replevin, on the ground of such warrant and delivery, and because the process issued by the Circuit Judge ousted the jurisdiction of the Court of Common Pleas, was improperly sustained. If there was any valid defense it should have been taken by answer, but could not be reached by a motion to dismiss. —Flentge v. Priest, 515.

RES ADJUDICATA; See Judgments, 4.

REVENUE.

1. *Revenue—Assessment of sub-divisions—Constr. Stat.*—The proper meaning of § 49 of the Revenue Act, (Wagn. Stat., 1167.) is that all sub-divisions of a section belonging to the same person should be reported as one tract although such sub-divisions may not be contiguous.—Sparks v. Clark, Auditor, 58.

REVENUE, continued.

2. *Revenue—County Board of equalization—Railroad assessments—Entries on assessment book by deputy county clerk of previous years—Assessment.*—An entry correcting the books of the county assessor, is not objectionable merely by reason of the fact that the entry, instead of being made by the county clerk, was made by his deputy, nor by reason of the fact that the order of the County Board of Equalization, directing the assessment to be placed on the assessor's books, was entered on the journal of its proceedings after the adjournment and dissolution of the Board, nor by reason of the fact that the assessment, having been omitted by mistake, was entered the year subsequent without notice of the time of the entry.—Pac. R. R. Co. v. County Clerk of Franklin Co., 223.

3. *Revenue—Indictment for false oath as to amount of taxable property—Averments, what sufficient.*—In an indictment under the revenue law for making a false oath as to the amount of defendant's taxable property where the complaint alleged in substance that defendant made the required statement and signed and subscribed it and desired the assessor to swear him to the same, and that he was then and there duly sworn and took his corporal oath before the officer, and the indictment after minutely setting out all the facts, proceeds to state that defendant "falsely, corruptly, etc., and with intent to defraud in and by said written oath did depose and swear." *Held*, that the indictment sufficiently set forth that the oath was taken to a written or printed list as required by the statute. (Wagn. Stat., 1163-5, § 28, 30 and 34.)—State v. Fouiks, 461.

See Taxes.

ROBBERY; See Practice, Criminal, 4.

S.

SALES.

1. *Vendors—Misrepresentations as to property sold—Negligence of vendee in making inquiries, may be set up by vendor, when—Estoppel.*—In suit upon a promissory note given for the purchase of certain stock, it appeared that defendant purchased the same from the president of the compony, who represented that the stock was at par, that the business was of great value, and that the corporation was solvent, all which representations proved untrue. It further appeared that defendant, before his purchase, had ample opportunities to learn the true state of affairs. But, *held*, that defendant had a right to presume that the vendor, as president of the company, was fully informed as to its financial condition, and the failure of the vendee to make inquiries relating thereto in other quarters was no proof of negligence such as would estop him from pleading the false representations as a bar to recovery on the note. —Wannell v. Kem, 478.

2. *Vendor—Fraudulent misrepresentations—What sufficient to defeat claim for purchase money.*—Fraudulent misrepresentations in order to defeat a recovery of purchase money for the property sold, must be made with intent to deceive and must be solely and exclusively relied upon by the vendee in making his purchase.—Id.

See Administration, 1; Frauds, Statute of; Fraudulent Misrepresentations, 1; Judgments, 5; Land and Land Titles, 9; Mortgages and Deeds of Trust; Sheriffs' Sales; Vendor's Lien.

SCHOOLS.

1 *Schools—Selection of site for sub-district school house.*—The directors of a school sub-district have no power of their own mere will or discretion to select a site for a school, but the selection must be made at a meeting of the voters called for that purpose. (Wagn. Stat., Ed. 1872, p. 1244, § 12.)—Seibert v. Botts, 430.

SCIRE FACIAS; see Practice, Civil, Actions, 1.

SEAL; see Mortgages and Deeds of Trust, 5; Notary Public, 1.

SEPARATE ESTATE; see Husband and Wife, 2.

SERVICE; see Judgment, 2, 3, 6; Practice, civil, 3.

SHERIFF.

1. *Sheriff—Failure of to collect on execution—Recovery against for—What remedy against—Execution defendant.*—A sheriff who, through neglect, has failed to collect money on an execution, and in consequence of such failure has been compelled to pay the debt to the plaintiff in the execution, cannot afterward in an ordinary action recover such amount from the defendant in the execution. —Walker v. Bradbury, 66.

2. *Sheriff—Seizure of goods attached by, on execution issued from another court —Duty of sheriff—Mode of settling claims.*—A sheriff who holds property in his possession under a writ of attachment, and awaiting judgment in the attachment suit, cannot seize and sell the same property on a special execution, issued by another court of co-ordinate jurisdiction, in a proceeding commenced subsequent to the levy of the attachment.

The goods attached are in the custody of the law, until disposed of by a final judgment, and meanwhile, are beyond seizure by any execution or attachment.

In such case the sheriff should return the execution to the court from whence it issued, with the indorsement thereon that the property is in his possession, under a writ from a different court, and the plaintiff in the execution may then, under the statute (Wagn. Stat., p. 191, § 50,) be transferred to the court in which the attachment originated, and the conflicting claims be there settled.—Metzner v. Graham, 404.

SHERIFF'S SALE.

1. *Sheriff's sales—Notice—Time of sale—Innocent purchaser.*—Real estate sold on execution, must be sold at the time and place announced in the notice given for such sale, and the sale cannot be postponed to another day by order of court, without a new notice; and when a sale is so postponed, the purchaser is not protected by his good faith, if the want of notice or defect of notice appears on the face of the sheriff's deed.—Ladd v. Shippie, 523.

SHERIFF'S DEED.

1. *Sheriff's deed—Recitals as to judgment in favor of administrator.*—The record entry of a judgment recited its rendition in favor of A. and B. The execution recited judgment of same date for same sum and against same defendant, but in behalf of A. & B., as administrators, and alleged that their letters had been revoked, and that execution had been ordered in the name of the public administrator, and the substitution was shown by the court records. *Held*, that the record taken together sufficiently showed that the judgment was in favor of A. & B., in their administrative capacity, and that a sheriff's deed reciting such judgment, was not *quod hoc* defective.–Acock v. Stuart, 150.

2 *Sheriff's deed—Cannot be attacked collaterally, when.*—In ejectment for land bought at sheriff's sale, mere irregularities which do not render the deed absolutely void, cannot be inquired into.—Hewitt v. Weatherby, 276.

See Practice, Civil, 3; Sheriff's Sales.

SPECIAL TAXES; see Revenue; Streets.

STATEMENT; see Justices' Courts, 3.

STATUTE, CONSTRUCTION OF.

1. *Statute, omission of—Intention of legislature.*—The Supreme Court cannot declare that the omission of a statute was unintentional, where nothing in regard to the intention of the legislature is expressed or necessarily implied. Such declaration would be in the nature of judicial legislation.—State v. Clark, 25.

See ADMINISTRATION, 3, (Wagn. Stat. 95, § 11).
BANKS AND BANKING, 5, (Wagn. Stat. 783, § 5).
CONDEMNATION OF LAND, 5, (Sess. Acts, 1873, p. 24, § 4).
CONSTABLE, 2, (Wagn. Stat. 844–5, §§ 19, 20, 23).
CONTRACTS, 2, (Wagn. Stat. 783, § 5).
CORPORATIONS, 4, (Wagn. Stat. 335–6, § 12).
COUNTY BONDS, 1 (Adj. Sess. Acts, 1870, p. 18, § 12).
CRIMINAL LAW, 4, (Wagn. Stat. 490, § 15).
DAMAGES, 2, (Wagn. Stat. 310, § 42).
DIVORCE, 2, (Wagn. Stat. 541, § 14).
DOWER, (See DIVORCE *Supra.*)
EJECTMENT, 1, (Wagn. Stat. 1040–1, §§ 11 12, 13; 1042, §§ 20, 22).
EVIDENCE, 1, (Wagn. Stat., 1372–3, § 5); 5, (Wagn. Stat. 1078, § 25).
FENCES, 1, (Wagn. Stat. 633; *Id.* 707, § 87); 2, (Wagn. Stat. 633, § 1).
HOMESTEAD, 1, (Wagn. Stat. 698, §§ 7, 8, 9); 2, (Wagn. Stat. 698, § 5).
HUSBAND AND WIFE, 2, (Wagn. Stat. 273, § 2).
INN KEEPERS, 1, (Wagn. Stat, 710, § 1).
INSURANCE, FIRE, 4, (Wagn. Stat. 1020, § 42).
INSURANCE, LIFE, 1, (Wagn. Stat. 294, § 28).
JUSTICES' COURTS, 2, (Wagn. Stat. 846–7, §§ 1, 2; *Id.* 832, § 17; R. C. 1855, p. 953, § 17); 3, (Wagn. Stat. 849, § 13); 4, (Wagn. Stat. 917–18, §§ 8, 9, 10); 5, 6, (Wagn. Stat. 808, § 3).
LAND AND LAND TITLES, 14, (Wagn. Stat. 595, §§ 35, 36; Act March 22, 1873); 16, (R. C. 1855, p. 1330, § 21).
LANDLORD AMD TENANT, 3, (Wagn. Stat. 849, § 13).
LIMITATION, 1, 2, (Sess. Acts, 1856–7, p. 78, § 9); 2, (Gen. Stat. 1865, p. 746, § 7); 4, (Wagn. Stat. 917, 918, §§ 8, 9, 10); 6, Wagn. Stat. 919, § 19).
MECHANIC'S LIEN, 1, (Const., Art. VI., § 13; Wagn. Stat. 430, § 2; Adj. Sess. Acts, 1872, p. 44).
MORTGAGES AND DEEDS OF TRUST, 4 (Wagn. Stat. 273, § 7; 277, §§ 24, 25, 26).
PAUPER, 1, (Wagn. Stat., 997–8, § 6).
PRACTICE, CIVIL—ACTIONS, 1, (Wagn. Stat., 1050, § 6;) 2, (Wagn. Stat., 294, § 28;) 6, (Wagn. Stat., 1040–1, §§ 11, 12, 13; 1042, §§ 20, 22).
PRACTICE, CIVIL—APPEAL, 2, (Wagn. Stat., 846–7, §§ 1, 2; *Id.* 832, § 17; R. C., 1855, 953, § 17).
PRACTICE, CIVIL—PARTIES, 1, (Wagn. Stat., 1034, § 6; 1037, § 20).
PRACTICE, CIVIL—PLEADING, 6, (Wagn. Stat., 1020, § 42;) 8, (Wagn. Stat., 1012, § 1; 1015, § 10).
PRACTICE, CIVIL—TRIALS, 1, (Wagn. Stat., 1033–4, §§ 1, 2;) 4, (Wagn. Stat., 1355–6, § 2;) 12, (Wagn. Stat., 1040–1, §§ 11, 12, 13; 1042, §§ 20, 22).
PRACTICE, CRIMINAL, 1, (Wagn. Stat., 1098 § 27;) 3, (Wagn. Stat., 1103 § 15;) 6, (Adj. Sess. Acts, 1872, p. 59).
RAILROADS, 1, (Adj. Sess. Acts, 1868, p. 92;) 2, 3, 5, 6, 13, (Wagn. Stat., 310, §§ 42, 43;) 4, (Act Dec. 25, 1852;) 10, (Wagn. Stat., 302, § 10; Sess. Acts, 1873, p. 61;) 15, (Wagn. Stat., 327, § 3).
REVENUE, 1, (Wagn. Stat., 1167, § 49;) 3, (Wagn. Stat., 1163–5, §§ 28, 30, 34).
SCHOOLS, 1, (Wagn. Stat., (1872,) 1244, § 12).
SHERIFF, 2, (Wagn. Stat., 191, § 50).
TRESPASS, 1, (Wagn. Stat., 808–9, § 3; 1345, § 1).
TROVER, 1, (Wagn. Stat., 808, § 3).
VENUE, 1, (Wagn. Stat., 1098, § 27;) 2, (Wagn. Stat., 1356, § 4; 1010, § 25;) 5, (Wagn. Stat., 1355–6, § 2).
WITNESSES, 1, (Wagn. Stat., 1372–3, § 5).

STATUTE OF FRAUD; see Fraud, Statute of.

STOCK, KILLING OF; see Railroads.

STREETS.

1. *Streets—Opening of—Non-payment for land taken for, what remedy proper.*—Where city authorities condemn a lot and are preparing the same for a public street, but fail to make payment for the land, injunction restraining the city from using it, until paid for, is improper. The remedy, if the owner claims the sale to be void, is ejectment; if valid, suit for the purchase money.—Hammerslough v. City of Kansas, 219.

See Corporations, Municipal, 1; Damages, 1; Land and Land Titles, 20.

SUBSCRIPTION.

1. *Contract—Subscription, alteration of—Ratification.*—Where the amount of an original subscription was altered by a third party, a subsequent ratification, would be equivalent to a previous authorization of the change.—Workman vs Campbell, 53.

2. *Subscription—Alteration—Consent—Burden of proof.*—In a suit on a contract of subscription, where the defense was an alteration without defendant's consent, of the amount subscribed, the *onus* would rest on plaintiff to prove that defendant placed opposite his name, or consented to have placed, the sum sued for.—Id.

See Railroads, 1.

SURETIES.

1. *Promissory notes—Extension—Surety, when held.*—An extension of the time for a definite period was granted to the principal maker of a note without the consent of the surety, and the contract for extension was indorsed on the back of the note. Surety was released.—German Sav. Ass. v. Helmrick, 100.

2. *Promissory notes—Extension—Payment of interest in advance—Discharge of sureties.*—A promise of extension upon a note, in order to discharge a surety thereon, must be such as will prevent the holder from bringing an action against the principal; and the taking of interest in advance will not constitute such a promise.—Hosea v. Rowley, 357.

3. *Promissory note—Extension—Discharge.*—An extension granted to the principal debtor in a promissory note, in consideration of usurious interest paid in advance, will not operate a release of the surety.—Farmers' & Traders' Bank v. Harrison, 503.

See Bills and Notes, 3, 4; Guardian and Ward, 1.

T.

TAXES; See Husband and Wife, 2; Land and Land Titles, 12, 16; Mortgages and Deeds of Trust, 2; Railroads, 4; Revenue

TAX DEED; See Conveyances, 3.

TENDER; See Landlord and Tenant, 2.

TRANSCRIPT; See Judgment, 2, 6; Justices' Courts, 4.

TRESPASS.

1. *Trespass—Common law and statutory trespass united in one suit—Jurisdiction of justice, extent of—Power of court to treble damages.*—Where plaintiff's causes of action comprehend a common law trespass, for wrongfully entering his land, and also a trespass under the statute for cutting down and carrying away his timber: and the verdict in general concerning both trespasses, the damages cannot be trebled.

In such proceeding a justice would, under the statute concerning justices' courts (Wagn. Stat., 808-9, § 3), have jurisdiction to hear a case for single damages, to the extent of fifty dollars; and under the trespass act (Wagn. Stat., 1345, § 1), suit being for statutory trespass only, the court may treble the verdict.—Shrewsbury v. Bawtlitz, 414.

See Justices' Courts, 5; Railroads, 15.

TROVER.

1. *Justice of the peace—Jurisdiction in trover.*—A justice of the peace has no jurisdiction for trover and conversion of an amount exceeding fifty dollars. (Wagn. Stat., 808, § 3.)—Spencer v. Vance, 427.

2. *Trover—Measure of damages.*—In trover the measure of damages is the market value of the property at the time of conversion, with interest up to the time of trial, and not the price paid for it. This rule is subject to qualification where the value of the property is fluctuating.—Id.

3. *Actions—Trover of stock sent south during the war.*—In suit for the value of certain stock, where it appeared that plaintiff had sent the same from Missouri into Texas, after the President's proclamation of non-intercourse of August 16th, 1861, and that defendant had there converted it to his own use; *held,* that these facts would not bar plaintiff's right of recovery. The plaintiff's act in sending the stock through the lines, authorized its appropriation by the general government but not by a private citizen.—Charles v. McCune, 166.

See Practice, civil,; Actions, 4.

TRUSTS AND TRUSTEES; See Equity, 1; Mortgages and Deeds of Trust; Practice, Criminal, 6. Vendor's Lien, 2, 3.

U.

USURY.

1. *Usury—Criminality—Illegality.*—Usury is not now considered a crime, so as to render invalid every contract into which it enters. The contract is illegal only to the extent of the forbidden excess of interest.—F. & T. Bank v. Harrison, 503.

See Bills and Notes, 4, 10; Corporations, 7, 8.

V.

VARIANCE; See Attachment, 1; Practice, civil-Pleading, 7; Practice, civil-Trials, 1, 2.

VENUE.

1. *Practice, criminal—Change of venue.*—Notwithstanding the provisions of the statute, (Wagn. Stat., p. 1098, § 27,) a second change of venue may be granted in a criminal cause when the judge has been of counsel therein. (See State vs. Gates, 20 Mo., 400.)—State v. Underwood, 40.

2. *Venue, change of—Notice, what necessary.*—The "reasonable notice" of application for change of venue, required by the statute, (Wagn. Stat., 1356, § 4) is not necessarily the five days' notice prescribed by the General Statute touching service of notices. (Wagn. Stat., 1010, § 25.) The latter section was intended to furnish nothing more than a general rule for the guidance of the trial courts, and was never intended to be of universal application, or absolute and inflexible in its character.

Thus, where pending the impaneling of a jury, the court adjourned over Sunday, an application for change of venue, filed on the opening of the court Monday morning, was held in that case neither deficient in point of time, nor by reason of failure of written notice.—Corpenny v. City of Sedalia, 88.

3. *Venue, change of—Affidavit sworn to by city attorney, when proper.*—The affidavit attached to the petition of a municipality for change of venue, is properly sworn to by the city attorney rather than by the mayor.—Id.

4. *Venue, change of—Application for—Proof not necessary, when.*—Where an application for change of venue is made after answer filed, on the ground that the cause for such change arose or became known to deponent after the filing, if the application complies with the statute, (Wagn. Stat., 1355-6, § 2) as to its recitals and verifications, it is sufficient to establish a *prima facie* right to the order. The applicant is not compelled to follow the statute literally, and establish by evidence *aliunde,* the facts sworn to.—Id.

VENUE, continued.

5. *Venue, change of—Time of filing application for.*—The provision of the legislature requiring the motion for a change of venue to be filed on or before the filing of defendant's answer to the merits, is imperative. (Wagn. Stat., p. 1355, §§ 2, 3.)—Jenkins v. Hill, 122.

VENDOR'S LIEN.

1. *Land and land titles—Exchange of lands—Deed of trust—Vendor's lien, etc.*, —A. owned a tract of land in the country, and B., a house and lot in the city incumbered by a debt for $1,000, secured by deed of trust. They agreed to exchange, and did exchange property with each other, upon the express condition and agreement that upon exchanging titles the incumbrance on the property of B. should be removed, and that such removal should be received in part payment of the property of A.,-B. having obtained the title from A. by means of such promise, to remove the incumbrance. *Held*, 1st. That the debt which was secured by the deed of trust on the house and lot, would constitute, until removed, a vendor's lien on the tract of land conveyed to B., notwithstanding that the deed from B. to A. contained covenants of warranty, for breach of which an action at law might be maintained. 2d. That such lien is treated as a constructive or implied trust, and therefore not within the statute of frauds.—Pratt v. Clark, 189.

2. *Vendor's lien enforced, notwithstanding law remedy, etc.*—The right of a vendor to enforce his lien may well, and frequently does, exist contemporaneously with a right of recovery at law, and the jurisdiction always exercised by courts of equity in cases of trust will not be ousted by the fact that courts of law could afford an apparently adequate relief.—Id.

VERDICT; See Ejectment, 1, 5, 6; Fraud, 1; Judgment; Jury, 1; Justice's Court, 1.

W.

WAGES; See Garnishment, 1.

WAIVER; See Insurance, Fire, 2, 4; Insurance, Life, 2; Practice, civil, 2; Practice, civil—Pleading, 5, 9.

WAR; See Practice, civil—Action, 4; Trover, 3.

WARRANTY; See Insurance, Fire, 3.

WILLS.

1. *Wills—Copies taken from courts of Probate, when admissible.*—Where Probate Courts under special statutes have superseded County Courts in the transaction of probate business, copies of wills taken from the records of the former courts are admissible in evidence, although the general statute of wills still requires the County Court clerk to record them.—Hubbard v. Gilpin, 442.

See Land and Land Titles, 6.

WITNESSES.

1. *Witnesses—Testimony of wife when substantially a party—Const. stat.*—Section 5 of the Witness Act (Wagn. Stat., 1372-3,) does not preclude the wife from testifying where she is a substantial party to the suit.—Harriman v. Stowe, 93.

2. *Agent of deceased person may testify as to transactions subsequent to the death.*—A transaction had by the agent of a deceased person, since the death of his principal, may be shown in evidence, but in such case the agent himself must testify.—Leeper, admr. v. McGuire, 360.

See Evidence, 3, 11, 12.